

**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1925**

**No. 15**

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**EDGAR S. APPLEBY AND JOHN S. APPLEBY, INDIVID-  
UALLY AND AS EXECUTORS OF THE LAST WILL AND  
TESTAMENT OF CHARLES E. APPLEBY, DECEASED,  
PLAINTIFFS IN ERROR,**

**vs.**

**THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL  
RAILROAD COMPANY OF NEW JERSEY, ET AL.**

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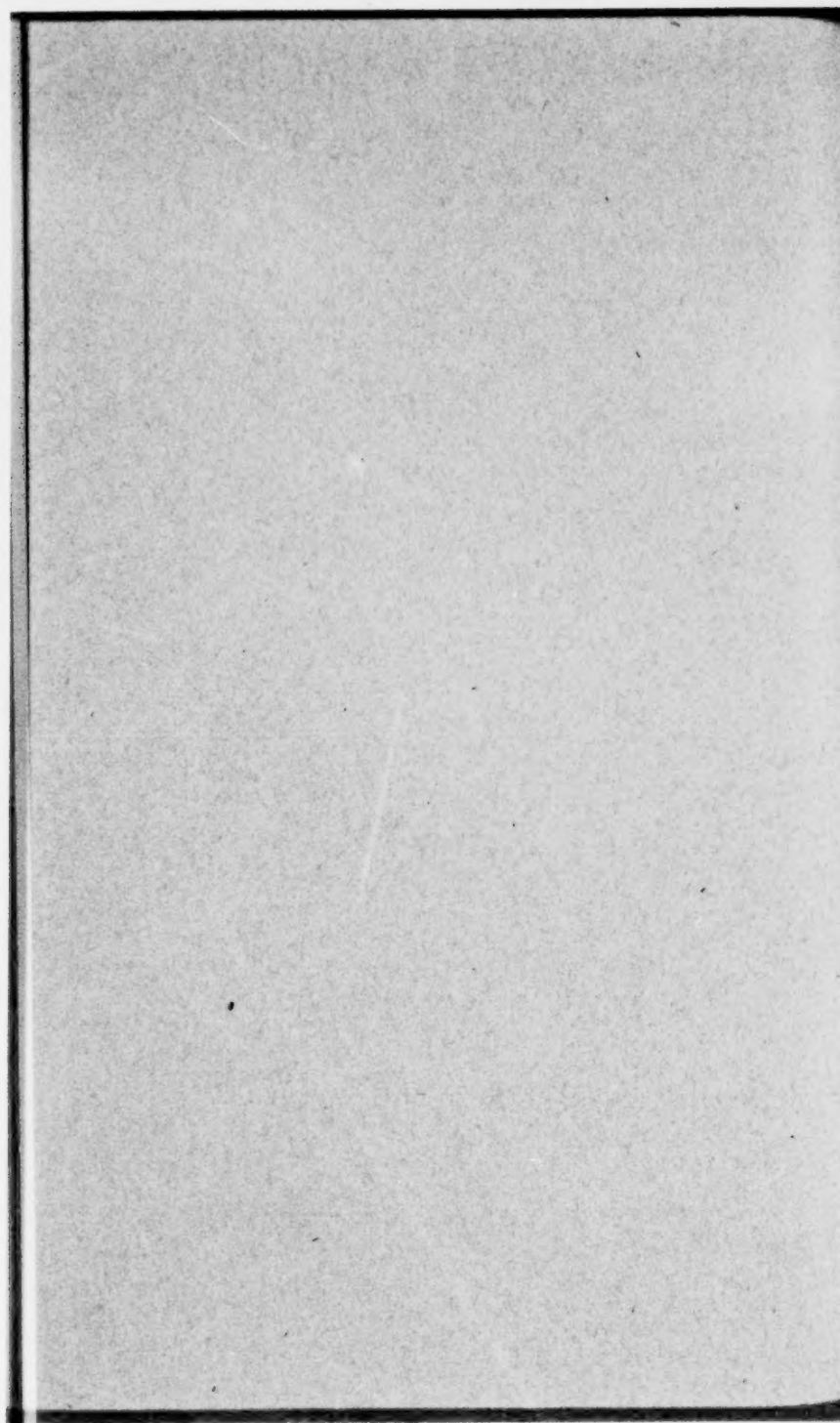
**IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK**

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**FILED SEPTEMBER 8, 1923**

**(29,842)**





(29,842)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 532

EDGAR S. APPLEBY AND JOHN S. APPLEBY, INDIVIDUALLY AND AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES E. APPLEBY, DECEASED, PLAINTIFFS IN ERROR,

*vs.*

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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AT A SPECIAL TERM, PART II, OF THE

**SUPREME COURT HELD IN AND FOR THE COUNTY OF  
NEW YORK**

AT THE COURT HOUSE, IN SAID COUNTY, ON THE 27TH DAY OF APRIL,  
1923

Present: Hon. James O'Malley, Justice.

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as Ex-  
ecutors of the Last Will and Testament of Charles E. Appleby,  
Deceased, Plaintiffs,

against

THE CITY OF NEW YORK, EBEN E. ALCOTT, CENTRAL RAILROAD OF  
New Jersey, New York Butchers' Dressed Meat Company, New  
York Horse Manure Transportation Company, Burns Brothers,  
New York Stock Yards Company, and Weehawken Stock Yard  
Company, Defendants.

**ORDER ON REMITTITUR**

The plaintiffs and the defendants The City of New York and Weehawken Stock Yard Company, having each appealed from part of the judgment herein of the Appellate Division of the Supreme Court, in and for the First Judicial Department, dated the 22nd day of March, 1922, and entered and filed in the office of the Clerk of the County of New York on or about the same day, which said judgment modified and affirmed the judgment of the Supreme Court entered herein in the office of the Clerk of the County of New York on or about the 25th day of July, 1917; and the said appeal having been duly argued at the Court of Appeals and after due deliberation the said Court of Appeals having, in an order made and dated the 17th day of April, 1923, and entered therein on the 18th day of April, 1923, ordered and adjudged that the judgment of the Appellate Division of the Supreme Court appealed from herein be affirmed without costs; and having also further ordered that the record therein and the proceedings in said Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Now, upon reading and filing the said remittitur, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

J. O'M., J. S. C.



## NEW YORK SUPREME COURT, NEW YORK COUNTY

[Title omitted]

ORDER AFFIRMING JUDGMENT OF APPELLATE DIVISION—Filed May  
21, 1923

The plaintiffs and the defendants the City of New York and Weehawken Stock Yard Company, having each appealed from part of the judgment herein of the appellate Division of the Supreme Court, in and for the First Judicial Department, dated the 22nd day of March, 1922, and entered and filed in the office of the Clerk of the County of New York on or about the same day, which said judgment modified and affirmed the judgment of the Supreme Court entered herein in the office of the Clerk of the County of New York on or about the 25th day of July, 1917; and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the said Court of Appeals having, in an order made and dated the 17th day of April, 1923, and entered therein on the 18th day of April, 1923, ordered and adjudged that the judgment of the Appellate Division of the Supreme Court appealed from herein be affirmed without costs; and an order having been duly entered in the office of the Clerk of the County of New York on the 27th day of April, 1923, making the order and judgment of the Court of Appeals the order and judgment of this Court:

Now, on motion of George P. Nicholson, Corporation Counsel, attorney for defendants, it is

Ordered and adjudged that the judgment of the appellate Division of the Supreme Court appealed from herein be affirmed.

Dated, New York, May 21st, 1923.

James A. Donegan, Clerk. (L. S.)

[File endorsement omitted.]

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STATE OF NEW YORK, ss:

## COURT OF APPEALS

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 17th day of April, in the year of our Lord one thousand nine hundred and twenty-three, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.  
R. M. Barber, Clerk.

c

REMITTITUR, APRIL 18, 1923

[Title omitted]

Be it remembered, That on the 22nd day of June, in the year of our Lord one thousand nine hundred and twenty-two, Edgar S. Appleby & ano. Ind. &c., the plaintiff-appellants in this cause, came here unto the Court of Appeals, by Banton Moore, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York & ano., the defendant-appellants in said cause, afterwards appeared in said Court of Appeals by John P. O'Brien and Stetson, Jennings & Russell, their attorneys, and also filed notice of appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Spotswood D. Bowers, of counsel for the plaintiff-appellants, and by Mr. Charles J. Nehrbas, of counsel for the defendant-appellant City of New York and submitted by other deft-applt., and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said judgment be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. Barber, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, Apr. 18, 1923.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. Barber, Clerk. (Seal.)

AT A SPECIAL TERM, PART II, OF THE SUPREME COURT HELD IN AND FOR THE COUNTY OF NEW YORK, AT THE COURT HOUSE, IN SAID COUNTY ON THE 13TH DAY OF JUNE, 1923.

Present: Hon. Richard P. Lydon, Justice.

[Title omitted]

ORDER ON MOTION FOR REARGUMENT

The plaintiffs in the above entitled action having moved for a re-argument of the appeal herein and the said motion having come duly on to be heard before the Court of Appeals and the said Court of Appeals having in an order dated the 5th day of June, 1923, denied the said motion with \$10. costs and necessary printing disbursements, now upon reading and filing the said order of the Court of Appeals, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter.

(S.) R. P. L., J. S. C.

STATE OF NEW YORK:

IN THE COURT OF APPEALS

At a Court of Appeals for the State of New York Held at Court of Appeals Hall, in the City of Albany, on the Fifth Day of June A. D. 1923,

Present: Hon. Frank H. Hiscock, Chief Judge, presiding.

[Title omitted]

ORDER ON MOTION FOR REARGUMENT

A motion for a re-argument of the above cause, having been heretofore made upon the part of the plaintiff-appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

(Sgd.) Wm. J. Armstrong, Deputy Clerk. (Seal.)

# Supreme Court,

NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Ap-  
pleby, deceased,

2

Plaintiffs,

against

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

3

Defendants.

## Statement Under Rule 41.

This action was begun by the service of a summons and complaint upon the defendant, The City of New York, on the 15th day of September, 1914. Issue was joined by the service of said defendants' answer to the amended complaint on the 22nd day of June, 1915. There has been no change of parties or attorneys since the commencement of the action, except that William P. Burr has succeeded Lamar Hardy as Corporation Counsel.

4      **Plaintiffs' Notice of Appeal.**

NEW YORK SUPREME COURT,  
NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

5                                      Plaintiffs-Appellants,

against

THE CITY OF NEW YORK,  
Defendant-Respondent,

25404—1914.

EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,

6                                      Defendants.

*Sirs:*

PLEASE TAKE NOTICE that the above named plaintiffs hereby appeal to the Appellate Division of the New York Supreme Court in and for the First Department, from the judgment herein entered and filed in the office of the Clerk of the County of New York, on or about the 25th day of July, 1917, and the said plaintiffs-appellants appeal from every

*Plaintiffs' Notice of Appeal*

7

part of said judgment, as well as from the whole thereof.

Dated, New York, August 17th, 1917.

Yours, etc.,

BANTON MOORE,  
Attorney for Plaintiffs-Appellants,  
1 Liberty Street,  
Borough of Manhattan,  
City of New York.

8

To:

LAMAR HARDY, Esq.,  
Corporation Counsel,  
Attorney for Defendant-Respondent.

WILLIAM F. SCHNEIDER, Esq.,  
County Clerk, New York County.

DE FOREST BROTHERS, Esqs.,  
Attorneys for Central Railroad  
Company of New Jersey,  
30 Broad Street,  
New York City.

9

STETSON, JENNINGS & RUSSELL, Esqs.,  
Attorneys for Weehawken  
Stock Yard Company,  
15 Broad Street,  
New York City.

CHARLES RUNYON, Esq.,  
Attorney for Burns Bros.,  
2 Rector Street,  
New York City.

FARRELL & ASCH, Esqs.,  
Attorneys for New York  
Butchers Dressed Meat Company,  
55 Liberty Street,  
New York City.

10 **Notice of Appeal of Defendant City of  
New York.**

SUPREME COURT,  
NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

11 Plaintiffs-Respondents.

against

THE CITY OF NEW YORK,  
Defendant-Appellant,

EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,

12 Defendants.

*Sirs:*

PLEASE TAKE NOTICE that the defendant, The City of New York, hereby appeals to the Appellate Division of the New York Supreme Court in and for the First Department, from the judgment herein entered and filed in the office of the Clerk of the County of New York, on or about the 25th day of July, 1917, whereby it is, among other things, adjudged that the said defendant be enjoined from excavating, dredging or removing the soil on plain-



*Notice of Appeal of Defendant City of New York* 13

tiffs' said premises, and that the said plaintiffs recover of the said defendant the sum of \$124.39 costs, and the said defendant appeals from every part of said judgment, as well as from the whole thereof.

Dated, New York, August 13th, 1917.

Yours, etc.,

LAMAR HARDY,  
Corporation Counsel,  
Attorney for Defendant-Appellant, 14  
The City of New York,  
Office and Post Office Address,  
Municipal Building,  
Borough of Manhattan,  
New York City.

To:

BANTON MOORE, Esq.,  
Attorney for Plaintiffs-Respondents.

To:

WILLIAM F. SCHNEIDER, Esq., 15  
County Clerk,  
New York County.

**16 Notice of Appeal of Defendant Weehawken Stock Yards Company.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

Plaintiffs,

17

against

THE CITY OF NEW YORK,

Defendant,

25404—1914.

EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,

18

Defendants.

*Sirs:*

PLEASE TAKE NOTICE that defendant Weehawken Stock Yard Company hereby appeals to the Appellate Division of the Supreme Court in and for the First Judicial Department, from so much and such part of the judgment herein entered and filed in the office of the Clerk of the County of New York, on or about the 25th day of July, 1917, as orders, adjudges and decrees that the City of New York,

*Notice of Appeal of Weehawken Stock Yards Co.* 19

its agents, servants, contractors, representatives or assigns, or any person or persons whatsoever claiming to have authority from said City be enjoined from excavating, dredging or removing the soil of plaintiffs' premises.

Dated, New York, August 30, 1917.

Yours, etc.,

STETSON, JENNINGS, & RUSSELL,

Attorneys for defendant

Weehawken Stock Yard Company,

Office and P. O. Address,

20

15 Broad Street,

Borough of Manhattan,

New York City.

To:

BANTON MOORE, Esq.,

Attorney for Plaintiffs,

1 Liberty Street,

Borough of Manhattan,

City of New York.

LAMAR HARDY, Esq.,

Corporation Counsel,

Attorney for Defendant,

City of New York.

21

WILLIAM F. SCHNEIDER, Esq.,

County Clerk,

New York County.

DE FOREST BROTHERS, Esqs.,

Attorneys for Central Railroad

Company of New Jersey,

30 Broad Street,

New York City.

CHARLES RUNYON, Esq.,

Attorney for Burns Bros.,

2 Rector Street,

New York City.

FARRELL & ASCH, Esqs.,

Attorneys for New York

Butchers Dressed Meat Company,

55 Liberty Street,

New York City.

22

**Summons.**

**SUPREME COURT,  
NEW YORK COUNTY.**

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

Plaintiffs,

against

23 THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

*To the above named Defendants:*

24 YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, Sept. 15th, 1914.

BANTON MOORE,  
Plaintiffs' Attorney,  
No. 1 Liberty Street,  
Borough of Manhattan,  
New York City.

**Amended Complaint.**

25

SUPREME COURT,

NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

Plaintiffs,

against

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

26

The plaintiffs above named, through Banton  
Moore, their attorney, for an amended complaint  
herein, respectfully show to this Court and allege:

27

## FOR A FIRST CAUSE OF ACTION:

I. The defendant, The City of New York, is a domestic corporation, organized and existing under the Laws of the State of New York, and is the successor of the corporation, The Mayor, Aldermen and Commonalty of the City of New York, and that The City of New York is bound by all the covenants and obligations contained in or created by two certain deeds or grants made by The Mayor, Alder-hereinafter mentioned in paragraphs III and LXXIII.

*Amended Complaint*

II. That the defendant, New York Butchers Dressed Meat Company is a domestic corporation organized and existing under the Laws of the State of New York with its principal place of business in the City and County of New York.

That the defendant, New York Horse Manure Transportation Company, is a foreign corporation, organized and existing under the Laws of the State of New Jersey, having a place of business in the City and County of New York.

III. That on or about the 1st day of August, 1853, The Mayor, Aldermen and Commonalty of the City of New York, for a specified sum of money and certain covenants and agreements mentioned and contained in and by an indenture in writing, a copy of which is hereto annexed and marked Schedule "A," duly granted, bargained, sold, aliened, released and conveyed in fee simple absolute unto Charles E. Appleby, his heirs and assigns, all that certain block of land or soil under water to be made land and gained out of the Hudson or North River lying and being between Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, in the County and City of New York, together with other property, all of which is described in said indenture marked Schedule "A," annexed hereto and made a part hereof as if herein set forth at length.

IV. That the said grant or conveyance mentioned in Paragraph III hereof was duly recorded in the office of the Register of New York County on or about the 3rd day of September, 1853, in Liber 636 of Conveyances, at page 452, and a duplicate or counter part thereof is on record in the Comptroller's office of New York City, in Book 1 of Grants, at page 181.

*Amended Complaint*

31

V. Upon information and belief that said Charles E. Appleby entered into possession of the premises described in the indenture set forth in Schedule "A" herein, and remained the sole owner in fee simple thereof until the date of his death on or about December 15, 1913.

VI. That on or about the 15th day of December, 1913, the said Charles E. Appleby died in the City and County of New York, leaving him surviving his two sons, Edgar S. Appleby and John S. Appleby, the plaintiffs herein, and no other heirs at law or next of kin. Said Charles E. Appleby also left a last will and testament which was duly admitted to probate in the office of the Surrogate of Monmouth County, New Jersey, on or about the 26th day of December, 1913, and an exemplified copy of said Last Will and Testament duly authenticated was duly filed in the office of the Surrogate of New York County on or about January 23, 1914, and in the office of the Clerk of New York County on or about the 24th day of January, 1914. In and by said Last Will and Testament said Charles E. Appleby devised and bequeathed all of his property, both real and personal, to his two sons, Edgar S. Appleby and John S. Appleby, the plaintiffs herein, and also appointed said plaintiffs the executors of his said Last Will and Testament and that these plaintiffs have duly qualified and were duly appointed and now acting as such executors, and a copy of the letters testamentary issued to such executors, duly authenticated as prescribed by law has been duly filed in the office of the Clerk of this Court on or about January 24th, 1914.

VII. That upon the death of Charles E. Appleby on or about the 15th day of December, 1913, the plaintiffs, Edgar S. Appleby and John S. Appleby,



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became the sole owners in fee simple absolute and in possession, except for the trespasses herein mentioned, of all of the premises hereinbefore mentioned and described in Paragraph III hereof and have remained and now are the sole owners in fee simple absolute and in possession, except for the trespasses herein mentioned, of said premises, and of all the easements of light, air and access in the streets and avenues in front of and appurtenant to the said granted premises and the rights, terms, wharfage, crantage, dockage and emoluments appurtenant or belonging thereto.

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VIII. That on or about the 12th day of April, 1837, The People of the State of New York, represented in Senate and Assembly, duly enacted Chapter 182 of the Laws of 1837, entitled, "An act to establish a permanent exterior street or avenue in the City of New York, along the easterly shore of the North or Hudson's River and for other purposes."

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IX. Said act of 1837 immediately, or very soon thereafter, became a law and at all times mentioned herein and now is in full force and effect in so far as the right and title of these plaintiffs to the premises described in Paragraph III hereof are concerned.

X. That by virtue of the provisions of Chapter 182 of the Laws of 1837, Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets in front of and adjacent to plaintiffs' premises and shown in said grants were duly laid out, created, extended and established as streets and highways and all right and title of the People of the State of New York to the land under water between the westerly side of Thirteenth Avenue and the westerly side

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of the lands under water theretofore granted to the Mayor, Aldermen and Commonalty of the City of New York, by letters patent, in pursuance of the act entitled, "An act relative to the improvement of the City of New York, passed February 25, 1826," was granted to and vested in the Mayor, Aldermen and Commonalty of the City of New York, and that the said premises which were so granted by the People of the State of New York to the Mayor, Aldermen and Commonalty of the City of New York by said act of 1837 included the premises mentioned and described in Paragraph III, herein. 38

XI. Upon information and belief that on and after April 12, 1837, by virtue of the provisions of said Chapter 182 of the Laws of 1837, Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, became, have at all times continued to be and now are public streets and avenues in the City of New York. That the title and interest which the City of New York had in and to said streets and avenues was reserved, withheld and owned by the Mayor, Aldermen and Commonalty of the City of New York and its successor, The City of New York, in trust for the uses and purposes of public streets, avenues and highways and in trust to maintain said streets and avenues as public streets and avenues are usually maintained, and subject to the private easements and rights granted as aforesaid. 39

XII. Upon information and belief that at the time of the said grant or conveyance to Charles E. Appleby mentioned in Paragraph III, hereof, the said Chapter 182 of the Laws of 1837 was in full force and effect, as aforesaid, and Thirteenth Avenue was the duly laid out and existing permanent and public exterior street along the East shore of the Hudson River, and constituted at all times

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since 1837 and now constitutes the westerly boundary of plaintiffs' said lands under water, and Twelfth Avenue was duly laid out, continued and extended along its present lines, and Thirty-ninth and Fortieth Streets were duly laid out, continued and extended along the present lines thereof out to said Thirteenth Avenue.

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XIII. Upon information and belief that the said grant and conveyance mentioned in Paragraph III hereof, was made to and accepted by Charles E. Appleby in full faith and reliance upon the provisions of the said Chapter 182 of the Laws of 1837, and the rights and plan of improvement created by said act and the title granted to the Mayor, Aldermen and Commonalty of the City of New York thereby and especially upon the faith of the authority given by said act to said Mayor, Aldermen and Commonalty of the City of New York to grant and convey the premises therein mentioned with reference to the plan of improvement and line of solid filling in and by said act created and established. That the provisions of said act and the rights and plan of improvement therein created constituted an integral part of the contract consummated by the grant of the premises set forth in Paragraph III hereof. Among the rights created in and by said act was the right to fill in at the pleasure of said Charles E. Appleby and his heirs and assigns the premises out to said Thirteenth Avenue without having to obtain permission from said Mayor, Aldermen and Commonalty of the City of New York so to do and said Thirteenth Avenue was upon the taking effect of said act in 1837 and continued to be to and after the making of the grant set forth in Paragraph III hereof the permanent ripa or line out to which solid filling could be made,

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and that said Charles E. Appleby paid to the Mayor, Aldermen and Commonalty of the City of New York, a stated sum of money, which was the then value of said premises, and made certain covenants in said grant, and the Mayor, Aldermen and Commonalty of the City of New York received said payment and covenants and made said grant or conveyance under and by virtue of the said Chapter 182 of the Laws of 1837, with the full and complete knowledge, and understanding that said grantee, Charles E. Appleby, relied thereon.

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XIV. Upon information and belief that upon the execution and delivery of the said grant or conveyance to Charles E. Appleby, title in fee simple absolute to the lands under water between Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets vested in said Charles E. Appleby, his heirs and assigns, and also private easements of light, air and access in said streets and avenues, and certain rights and privileges of wharfage, crange and dockage, and the sole and exclusive right to build the streets and avenues vested in said Charles E. Appleby, his heirs and assigns, and the plaintiffs are now the owners in fee simple absolute of said premises and of the said easements, rights and privileges.

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XV. That neither the plaintiffs nor their testator and predecessor in title, Charles E. Appleby, have ever been required to build or erect said streets, wharves or bulkheads forming part or portions or whole of Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, shown on the said grant or conveyance marked Schedule "A" herein.

XVI. That plaintiffs and their testator or predecessor in title have duly kept and performed and

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complied with all articles, covenants and agreements contained in said grant to Charles E. Appleby, which he or they or any of them were on their part to keep or perform.

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XVII. That the plaintiffs and their testator and predecessor in title had and have a right under said grant and under the Laws of the State of New York to fill in all of said land under water between Thirty-ninth and Fortieth Streets, Twelfth and Thirteenth Avenues, shown on the map in Schedule "A" herein, and to reclaim it from the river and make it dry land, without having first to obtain permission so to do from the City of New York or its predecessor, the Mayor, Aldermen and Commonalty of the City of New York.

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XVIII. Neither the plaintiffs nor their testator or predecessor in title, Charles E. Appleby, have ever parted by grant, agreement, condemnation proceeding or otherwise with any right, title or interest in or to said lands under water and premises mentioned in Paragraph III hereof, or any right, privileges, easements or emoluments therein or appurtenant thereto, nor has compensation ever been made to plaintiffs or their testator and predecessor in title for any invasion of any right, title or interest, privilege or easements in or appurtenant to said lands and premises as hereinafter set forth.

XIX. That under and by virtue of Chapter 137 of the Laws of 1870, passed April 5, 1870, and entitled, "An act to reorganize the local government of the City of New York," as amended by Chapter 574 of the Laws of 1871, passed April 18, 1871, and entitled, "An act to amend an act entitled, 'An act to reorganize the local government of the City of New York', passed April 5, 1870."

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The Department of Docks of the City of New York was created, the head of which consisted of a board of five persons and said Department of Docks was authorized and directed to determine upon a plan for the improvement of the whole or any part of the water front of the City of New York, said plan to be approved by the Commissioners of the Sinking Fund and said board of the Department of Docks was authorized to acquire by purchase or condemnation proceedings in the name and for the benefit of the corporation of the City of New York any and all property in said City to which the corporation of the City of New York then had no right or title, and any rights, terms, easements and privileges pertaining to said property in said City and not owned by said corporation, necessary to carry said plan into effect when adopted and after the adoption of said plan by the Commissioners of the Sinking Fund, said Board of the Department of Docks was directed to lay out, establish and construct wharves, piers, bulkheads, basins, docks and slips in and upon or about the property not owned by the Mayor, Aldermen and Commonalty of the City of New York without interfering with the property or rights of any other person, but no power or authority whatever was given by said Statute or any other Statutes to the Mayor, Aldermen and Commonalty of the City of New York or the Board of the Department of Docks or any other board or department of said City, to establish and construct such wharves, piers bulkheads, basins, docks or slips in and upon or about the property not owned by the Mayor, Aldermen and Commonalty of the City of New York, or otherwise interfere with the same unless and until compensation was made.

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XX. That the wharves, piers, bulkheads, basins, docks and slips in the contemplation of said Statutes of 1870 and 1871, were to be built by the Mayor, Aldermen and Commonalty of the City of New York or the Board of the Department of Docks, or their successors, according to the said plan when duly adopted and after acquiring the property, rights, terms, easements and privileges necessary therefor, and, when constructed, such structures were to be for the sole benefit of the said corporation, or its successors, and by the express terms of said Statute, such structures were not authorized to be built and such plan could not be legally and physically carried into effect, so as to impair or injure vested property rights not owned by said City, unless and until such private property and all rights, terms, easements and privileges pertaining thereto, as were necessary, proper and desirable for the purpose, were acquired by the corporation, The Mayor, Aldermen and Commonalty of the City of New York, or its successors by voluntary purchase or legal proceedings under the power of eminent domain.

XXI. Upon information and belief that on or about the 27th day of April, 1871, pursuant to the said Statutes of 1870 and 1871, the said Commissioners of the Sinking Fund approved a plan for the improvement of the water front in the North or Hudson River, which plan was theretofore submitted to said commissioners by the said Board of the Department of Docks, and said plan included plaintiffs' said land under water between Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets.

XXII. Upon information and belief that in and by said plan a marginal wharf or so-called



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street was laid out and proposed over plaintiffs' said property. Said proposed marginal wharf or street was to be 250 feet wide, and included all of Twelfth Avenue and so much of plaintiffs' property as lay West of Twelfth Avenue and within a distance of 150 feet westerly therefrom, and it was proposed by said plan that said marginal street or wharf should be the limit of solid filling and that no land under water West of such marginal street should be filled in.

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XXIII. Upon information and belief that said plan further proposed and laid out a pier to commence at a point in West 39th Street at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within Thirty-ninth Street and to extend West about 500 feet into the Hudson or North River. Said plan also proposed to change the actual and legal foot of Thirty-ninth Street from the Westerly line or side of Thirteenth Avenue to the Westerly side of the proposed marginal wharf or street. Said plan also proposed that said pier should coincide practically with the lines of said Thirty-ninth Street and occupy all of the land in the street, and that the plaintiffs' said premises between Twelfth and Thirteenth Avenues and adjoining said pier and extending half way to Fortieth Street should become, and be used as, a slip or basin for boats, floats and water craft in arriving at, remaining and departing from said pier, and said plan necessarily contemplated the appropriation of plaintiffs' premises and their right to fill in the same and make dry land, and the destruction of their easements in the said street and avenue and their wharfage at Thirteenth Avenue, and necessarily would prevent them from performing their

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covenants to fill in the streets, and take away their right to fill in the same.

59 XXIV. Upon information and belief that said plan is now and at all times herein mentioned has been the sole and only plan according to which the Mayor, Aldermen and Commonalty of the City of New York or its successor, The City of New York, could lawfully improve the water front at the place in question and it could only do so upon first making compensation for property and rights necessary to be taken therefor.

60 XXV. Upon information and belief that on or about the 11th day of June, 1891, the Board of the Department of Docks of the City of New York adopted certain preambles and resolutions to acquire immediate title and possession to the plaintiffs' premises between Twelfth and Thirteenth Avenues, Thirty-ninth to Fortieth Streets and Fortieth to Forty-first Streets and the rights, easements and emoluments appurtenant thereto, for and on behalf of the Mayor, Aldermen and Commonalty of the City of New York, for the purpose of carrying out the improvement of the water front as provided for by said plan hereinbefore mentioned and requested the Counsel to the Corporation to institute legal proceedings for the immediate acquisition of said property, rights, terms, easements and privileges.

XXVI. Thereafter and in compliance with said direction the said Counsel to the Corporation of the Mayor, Aldermen and Commonalty of the City of New York, duly instituted a special proceeding in the Supreme Court, New York County, entitled "In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New

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York, acting by and through the Department of Docks of the City of New York, relative to acquiring all the right and title to and possession of the wharf property, rights, terms easements, emoluments and privileges of and to the lands, and the lands under water, necessary to be taken for the improvement of the water front of the City of New York, on the North River, between Thirty-ninth and Forty-first Streets and between Twelfth and Thirtieth Avenues, pursuant to the plans heretofore adopted by the Department of Docks and approved by the Commissioners of the Sinking Fund," which proceeding was instituted under the provisions of said Chapter 137 of the Laws of 1870, as amended by Chapter 574 of the Laws of 1871, and the acts amendatory thereof and supplemental thereto, and particularly Section 715 of Chapter 410 of the Laws of 1882.

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XXVII. On or about the 31st day of December, 1894, the Mayor, Aldermen and Commonalty of the City of New York, acting by and through the Department of Docks and the Counsel to the Corporation in said proceeding made application to and petitioned this Court, pursuant to the provisions of the Statutes in such cases made and provided for the appointment of three discreet and disinterested persons as commissioners of Estimate and Assessment, for the purpose of acquiring the right and title to and possession of the land under water, wharf property, rights, terms, easements, emoluments or privileges of said Charles E. Appleby, hereinbefore described for and on behalf of the Mayor, Aldermen and Commonalty of the City of New York, and to perform all manner of things, which are requisite and necessary in the premises and to make and submit a report to this Court

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without unnecessary delay. A copy of said petition is annexed hereto and marked Schedule "B" and made a part hereof, as if herein set forth at length.

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XXVIII. By an order of this Court in said proceeding duly made and entered on or about the 13th day of February, 1895, in the office of the Clerk of New York County, Lawrence Godkin, John T. Farley and Benjamin Perkins were nominated and appointed commissioners of Estimate and Assessment in said proceeding, and it was further ordered, that said commissioners proceed to make a just and equitable estimate and assessment of the loss and damage to the respective owners, lessees, etc., entitled unto or interested in said property in consequence of the acquisition of the same by the Mayor, Aldermen and Commonalty of the City of New York, and that said commissioners make their report in the premises without unnecessary delay.

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XXIX. Upon information and belief that the said commissioners duly qualified by taking and subscribing their oaths as required by law, and that the oaths of all commissioners were filed in the office of the Clerk of the County of New York, on or about the 19th day of January, 1895.

XXX. Upon information and belief that said commissioners thereafter duly organized and met and said Charles E. Appleby duly presented his claim to the commissioners and asked to be heard. That said proceeding is still pending and undetermined, but the defendant, The City of New York claims it has been discontinued as hereinafter set forth. No awards have been made therein and no payment whatsoever has ever been made to plaintiffs or their testator and predecessor in title,

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Charles E. Appleby, and that title has never vested in the City of New York in said proceeding or otherwise to any of the property, rights or easements hereinbefore mentioned.

XXXI. Upon information and belief that said Benjamin Perkins and John T. Farley, two of the Commissioners of Estimate and Assessment have since died, and no commissioners have been appointed in their place and no application has been made for the appointment of their successors. Under the provisions of law in such cases provided plaintiffs and their predecessors in title could not and cannot apply for the appointment of successors to said commissioners, but such application could and can only be made by the Corporation Counsel and it is made his duty to make such application.

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XXXII. Upon information and belief that on or about the 13th day of October, 1913, plaintiffs' testator, Charles E. Appleby, through Banton Moore, his attorney, demanded of Archibald R. Watson, Esq., the then Corporation Counsel that he make application for the appointment of commissioners in said condemnation proceeding in place of those who have died and stated that upon the failure of the Corporation Counsel to proceed with said condemnation proceeding, a writ of mandamus would be sought to enforce proceedings. The Corporation Counsel neglected to make such application and thereafter upon the 30th day of July, 1914, plaintiffs applied to the Supreme Court for a writ of mandamus to compel proceedings. Upon the hearing of the motion for the writ of mandamus, the Corporation Counsel requested an adjournment of one day during which day the Board of Estimate and Apportionment of the City of

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New York at a stated meeting on July 30, 1914, adopted a resolution attempting to discontinue the said condemnation proceeding, a copy of said resolution being attached hereto and made a part of this complaint and marked Schedule "C." On the adjourned date of said motion, the City raised the technical point, among other points, that no demand had been made on Frank L. Polk, Esq., who succeeded Mr. Watson as Corporation Counsel, and for this reason, the motion was withdrawn without prejudice and the Corporation Counsel claims that the condemnation proceeding was discontinued as aforesaid by the Board of Estimate on July 30, 1914.

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XXXIII. Upon information and belief that during the pendency of the aforesaid condemnation proceeding and without the consent and against the will of the plaintiffs or their predecessor in title and without acquiring the right so to do in any manner and without compensation and in and about the year 1900, The City of New York by its agents, servants, employees and representatives purporting to act under the plan heretofore mentioned, erected and constructed or caused to be erected or constructed a pier which is a permanent structure of steel and concrete approximately within the lines of Thirty-ninth Street beginning about 150 feet west of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue and on or about the 23rd day of July, 1902, built or caused to be built the approach to said pier and in or about the year 1904 erected and constructed or caused to be erected and constructed an overhanging dumping board or elevated platform on said pier beginning at a point about 40 feet east of the easterly side of Thirteenth Avenue and extending westerly

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across Thirteenth Avenue, which dumping board or elevated platform was and is now connected with said pier by means of an inclined runway, all of which pier and structures are still remaining and maintained unlawfully and illegally by the City of New York.

XXXIV. Under and by virtue of the grant or conveyance to Charles E. Appleby mentioned in Paragraph III hereof, said Charles E. Appleby, his heirs and assigns were vested with the sole and exclusive right to build when required or permitted by the Common Council of the City of New York the streets and avenues therein mentioned and shown. The piers and structures which the City of New York has built or caused to be built in said Thirtyninth Street between Twelfth and Thirteenth Avenues, interfere with plaintiffs' sole and exclusive right to build the streets, and practically prohibit and destroy that valuable right, and necessarily prevented and prevent plaintiffs from filling in and using their said premises in between said streets and avenues, and thereby render said premises profitless to them, as long as said trespass continues, and that plaintiffs are seriously damaged thereby. Said pier also impairs and destroys plaintiffs' private easements of light, air and access in Thirtyninth Street appurtenant to said premises and destroys the plaintiffs' right to wharfage on the west-  
erly side of Thirteenth Avenue.

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XXXV. The use of the northerly side of said pier for the approach of ships and water craft necessarily requires the use of plaintiffs' said premises adjacent thereto as and for a slip or basin for said pier for the passage of said boats to and from the pier and to moor at said pier for the purpose of loading and unloading at said pier. Such boats using the north side of said pier had and

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have necessarily to remain and dock or moor, and do remain, dock and moor for long periods over and upon plaintiffs' said premises using it as a slip or basin. The use of plaintiffs' said premises as a slip or basin for the northerly side of said pier was intended by the City of New York and has actually been used by said City and its servants, licensees, lessees and agents as such slip or basin, and prevent any use by the plaintiffs or their predecessor in title. Said pier and superstructures also

77 impair plaintiffs' easements of light, air and access in Thirty-ninth Street appurtenant to their said premises. That plaintiffs are desirous of using their said premises and cannot do so on account of the trespass by the defendants herein.

XXXVI. Upon information and belief that the defendant, The City of New York, during and since the construction of said pier has frequently through its agents, contractors and servants dredged plaintiffs' said premises without the consent of plaintiffs or their predecessor in title and without ac-

78 quiring the right so to do. That all of the plaintiffs' premises hereinbefore described have been dredged by frequent removal of the soil to a depth of about 16 feet and the defendants intend to continue to dredge said premises in the future and to maintain and use the same as a slip or basin. That plaintiffs' premises form and compose the entire half slip or basin adjacent to said pier between Twelfth and Thirteenth Avenues, and so much of said pier is dependent upon the maintenance and use of plaintiffs' premises as a half slip or basin.

XXXVII. Upon information and belief that said dredging was done for the purpose of making plaintiffs' said land under water more available as a slip or basin for the north side of said pier.



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XXXVIII. Upon information and belief that the defendant, The City of New York, acting by the Department of Docks and Ferries leased to the defendant, New York Horse Manure Transportation Company, a space of 277 feet on the north side of pier No. 79 in and at West Thirty-ninth Street for a manure dump from July 1, 1907 to July 1, 1912, at a rental of \$3,000 per annum and from July 1, 1912, to July 1, 1917, at a rental of \$3,000 per annum by the action of the Commissioner of Docks and Ferries on or about May 31, 1907, and March 12, 1912, together with the privilege of floating, mooring and docking boats, floats and water craft along side of said pier and over and upon plaintiffs' premises, and said defendant has been and is now using and intends to use the same under said lease. That said lease was made without the knowledge or consent of plaintiffs or their predecessor in title. §6

XXXIX. Upon information and belief that on or about the 1st day of April, 1914, the City of New York, by the action of the Commissioners of Docks and Ferries for a stated sum of money, to wit, about \$3,712.50 per annum issued a permit or license at the pleasure of the said commissioners, to the New York Butchers' Dressed Meat Company to use and occupy the northerly half of the surface of the pier, street, wharf or bulkhead in West Thirty-ninth Street for a distance of 300 feet, beginning at the inner end of said pier, together with the privilege of floating, mooring and docking boats, floats and water craft along side of said portion of said pier and over and upon the plaintiffs' premises, and said defendant has been and is now using and intends to use the same under said permit and that said permit was made without the knowledge or §1

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consent of plaintiffs or their predecessor in title. And that said City of New York has frequently from time to time since the construction of said pier made other leases and permits for the use of plaintiffs' premises as and for a half slip or basin adjacent to said pier.

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XL. That daily and continuously during all the times herein mentioned and up to and since the commencement of this action and during and continuously since the construction of said piers as aforesaid, the defendant, The City of New York, its agents, employees, representatives, lessees and tenants and the other defendants have unlawfully and illegally and without the consent of the plaintiffs, or their predecessor in title entered upon the plaintiffs' said premises with boats, floats and water craft and otherwise used the north side of said pier and plaintiffs' said premises for mooring, floating and docking said water craft and the City of New York has received a large amount of rent, income and profits therefrom, the amount of which is unknown to these plaintiffs, and deprived plaintiffs and their predecessors of any use of said premises, and the defendants have not made or offered any compensation whatsoever to these plaintiffs or their predecessor in title for the use of their said premises.

XLI. That the aforesaid use and occupation of plaintiffs' said premises, and trespass upon and interference with plaintiffs' premises, rights, terms, easements, emoluments and privileges aforesaid by the defendants, their agents, representatives, employees, lessees and tenants has been entirely without the consent of said plaintiffs or their predecessor in title, and against their will and without compensation to them and has been, is now a continu-

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ing trespass, and that the plaintiffs and their predecessor in title have received no compensation therefrom and no rents, income, and profits from the said term premises, rights, terms, easements, emoluments and privileges and that the plaintiffs and their predecessor in title expected that the Mayor, Aldermen and Commonalty of the City of New York and its successor The City of New York would continue and complete the condemnation proceeding hereinbefore mentioned in good faith and make compensation to plaintiffs and their predecessor in title for all rights and property invaded and sought to be taken and plaintiffs and their predecessor in title relied upon the good faith of the City of New York in instituting and proceeding with the said condemnation proceeding.

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XLII. That all of the acts of the defendants, The City of New York, in unlawfully constructing and maintaining said pier without having acquired any right, title, interest, easement or privilege so to do, and making the leases and issuing the permits and collecting the rentals for the use and occupation of said premises, rights, terms, easements and privileges, rendered and renders the same valueless to plaintiffs, prevented and prevents any use thereof by plaintiffs and said acts were done during and under the color and cloak of the said condemnation proceeding, which the said City of New York, by the Board of Estimate and Apportionment on July 30, 1914, claimed to have discontinued.

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XLIII. Upon information and belief that the City of New York intends to continue in the future to maintain and exclusively use said pier and to use, occupy and enjoy the premises, rights, terms, easements, emoluments and privileges of the plaintiffs hereinbefore mentioned, against the will and

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without their consent and without making compensation as is apparent from the attempted discontinuance of said condemnation proceeding as aforesaid. Therefore the plaintiffs are desirous of making immediate use of their said premises and recovering the damages sustained by the entry and trespass of the defendants.

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XLIV. That the plaintiffs are entitled to the immediate and exclusive possession of their said premises, rights, terms, easements, emoluments and privileges hereinbefore set forth, and to recover the fair and reasonable rental value of that portion of plaintiffs' said premises, to wit, the half slip or basin appurtenant to said pier used as a slip and basin as aforesaid during the period since the construction of said pier and during the time when the plaintiffs and their predecessor have been deprived of its use, which rental value plaintiffs allege upon information and belief is at the rate of upwards of \$25,000 per year.

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XLV. That immediately upon the attempted discontinuance of said condemnation proceeding and on or about the 31st day of July, 1914, the plaintiffs duly filed with the Comptroller of the City of New York a claim and demand annexed hereto as Schedule "E" which is made a part hereof as if set forth herein at length and that more than thirty days have elapsed since the presentment of said claim and the Comptroller of the City of New York has failed and neglected to adjust or pay the same.

XLVI. That in order to afford the plaintiffs adequate and just relief and to prevent the continuing trespass of the defendants, their agents, servants, employees, representatives and assigns, and to prevent a multiplicity of actions, the equitable inter-

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ference of this Court is necessary, and as incidental to such main relief, the plaintiffs ask that the fair and reasonable rental value of the use of that portion of plaintiffs' said premises be determined and awarded.

XLVII. Plaintiffs have no adequate remedy at law and will suffer irreparable injury unless said illegal piers, sheds and structures are removed and the acts herein complained of are enjoined.

## FOR A SECOND CAUSE OF ACTION.

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XLVIII. Plaintiffs repeat each and every allegation contained in Paragraph I of this complaint as if set forth at length.

XLIX. Upon information and belief that the Central Railroad Company of New Jersey is a foreign corporation organized and existing under the Laws of the State of New Jersey and having a place of business in the City, County and State of New York, and that Burns Brothers Company is a domestic corporation.

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L. Plaintiffs repeat each and every allegation contained in paragraphs "III," "IV," "V," "VI," "VII," "VIII," "IX," "X," "XI," "XII," "XIII," "XIV," "XV," "XVI," "XVII," "XVIII," "XIX," "XX," "XXI" and "XXII," and make the same a part hereof as if set forth herein at length.

LI. Upon information and belief that said plan further proposed and laid out a pier to commence at a point in West 40th Street at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within Fortieth Street and to extend West about 500 feet into the Hudson or North

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River. Said plan also proposed to change the actual and legal foot of Fortieth Street from the westerly line or side of Thirteenth Avenue to the westerly side of the proposed marginal wharf or street. Said plan also proposed that said pier should coincide practically with the lines of said Fortieth Street and occupy all of the land in the street, and that the plaintiffs' said premises between Twelfth and Thirteenth Avenues and adjoining said pier and extending half way to Thirtieth Street, should become, and be used as, a slip or basin for boats, floats and water craft in arriving at, remaining alongside of and departing from said pier, and said plan necessarily contemplated the appropriation of plaintiffs' premises and their right to fill in the same and make dry land and the destruction of plaintiffs' easements in the streets, and their wharfage rights at Thirteenth Avenue, and necessarily would prevent them from performing their covenants to fill in the streets, and would take away their right to fill in the same.

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96 LII. Plaintiffs repeat each and every allegation contained in paragraphs "XXIV," "XXV," "XXVI," "XXVII," "XXVIII," "XXIX," "XXX," "XXXI," "XXXII," and makes the same a part hereof as if set forth herein at length.

LIII. Upon information and belief that during the pendency of the aforesaid condemnation proceedings, without the consent and against the will of the plaintiffs and their predecessors in title and without acquiring the right so to do in any manner and without compensation, the City of New York, by its agents, servants, employees, contractors and representatives on or about the 29th day of December, 1911, purporting to be acting under

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the plan hereinbefore mentioned, erected and constructed or caused to be erected and constructed, a pier which is a permanent structure of concrete and steel approximately within the lines of West Fortieth Street, beginning at a point about 4 feet East of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue and on or about the 21st day of June, 1912, erected or constructed or caused to be erected or constructed on said pier an iron or steel shed, partly one story and partly two stories in height and the north and south walls of said shed are erected or attached to said pier and practically along the north and south lines of Fortieth Street.

98

LIV. That said pier has numerous doors and windows on the sides thereof which open directly in front of and on to plaintiffs' premises. That said doors were placed on the sides of said sheds so that boats moored and fastened alongside of said pier and over and upon plaintiffs' premises could discharge their cargo and freight into said shed.

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LV. That continuously since the construction of said pier and said shed and since the commencement of this action, defendants and each of them have continuously moored boats, floats and water craft over and upon plaintiffs' premises and the defendants herein intend to continue said acts in the future.

LVI. As the sides of said pier and shed practically coincide with the street line, it would be and is impossible for any boats, floats or water craft to moor, float or remain alongside of said pier between Twelfth and Thirteenth Avenues, without mooring, floating and remaining over and upon

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plaintiffs' premises, and the use of plaintiffs' premises as a slip or basin for said pier is the sole means of access by boats to that portion of said pier between Twelfth and Thirteenth Avenues.

101

LVII. That plaintiffs own and possess easements of light, air and access in Fortieth Street between Twelfth and Thirteenth Avenues, and that the construction and maintenance of said pier and shed impairs and interferes with said light, air and access and constitutes a taking thereof.

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LVIII. That the construction of said pier and shed between Twelfth and Thirteenth Avenues in Fortieth Street was and is unlawful and without the consent and against the will of the plaintiffs or their predecessors in title and prevents the exercise by the plaintiffs of their exclusive right to build said street and avenues and constitutes a taking of said right, which is a valuable property right granted to their predecessor in title by the Mayor, Aldermen and Commonalty of the City of New York.

LIX. Upon information and belief that said pier so constructed in Fortieth Street is now standing and has been since the date of its construction and now is illegally maintained by the City of New York between Twelfth and Thirteenth Avenues.

LX. Under and by virtue of the grant or conveyance to Charles E. Appleby mentioned in Paragraph III hereof, said Charles E. Appelby, his heirs and assigns were vested with the sole and exclusive right to build when required or permitted by the Common Council of the City of New York the streets and avenues therein mentioned and shown. The piers and structures which the City of New York has built or caused to be built in said Fortieth



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Street between Twelfth and Thirteenth Avenues, interfere with plaintiffs' sole and exclusive right to build the streets when permitted or required, and practically prohibit and destroy that valuable right, and necessarily prevented and prevents plaintiffs from filling in and using their said premises between said streets and avenues, thereby rendering said property profitless to them as long as said trespass continues, and that plaintiffs are seriously damaged thereby.

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LXI. The use of the southerly side of said pier for the approach of ships and water craft necessarily requires the use of plaintiffs' said premises adjacent thereto as and for a slip or basin for said pier for the passage of said boats to and from the pier and to moor at said pier for the purpose of loading and unloading at said pier. Such boats using the south side of said pier had and have necessarily to remain and dock or moor, and do remain, dock and moor for long periods over plaintiffs' said premises, using it as a slip or basin. The use of plaintiffs' said premises as a slip or basin for the southerly side of said pier was intended by the City of New York and has actually been used by said City and its servants, licensees, lessees and agents as such slip or basin, and all use, benefit and enjoyment thereof by the plaintiffs and their predecessor in title has been and now is prevented. Said pier and shed also impair plaintiffs' easements of light, air and access in Fortieth Street appurtenant to said premises. That plaintiffs are desirous of using their said premises and can not do so on account of the trespasses of the defendants herein.

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LXII. Upon information and belief that the defendant, the City of New York, during and since

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the construction of said pier has frequently, through its agents, contractors and servants dredged plaintiffs' said premises without the consent of plaintiffs or their predecessor in title and without acquiring the right so to do. That all of the plaintiffs' premises hereinbefore described have been dredged by frequent removal of the soil to a depth of about 16 feet and the defendants intend to continue to dredge said premises in the future and to maintain and use the same as a slip or basin. That

107 plaintiffs' premises form and compose the entire half slip or basin adjacent to said pier between Twelfth and Thirteenth Avenues, and so much of said pier is dependent upon the maintenance and use of plaintiffs' premises as a half slip or basin.

LXIII. Upon information and belief that said dredging was done for the purpose of making plaintiffs' said premises more available as a slip or basin for the south side of said pier.

108

LXIV. Upon information and belief that the defendant, The City of New York, acting by the Department of Docks and Ferries, leased to the defendant, Central Railroad Company of New Jersey, the outer 700 feet of the pier in and beyond West Fortieth Street for a period of ten years from February 1, 1912, to February 1, 1922, at \$13,900 per annum and a renewal of ten years from February 1, 1922, to February 1, 1932, at \$20,790 per annum and another renewal for ten years from February 1, 1932, to February 1, 1942, at \$22,869 per annum, as is shown by the action of the Commissioner on or about June 25, 1909 and January 30, 1912, approved by the Commissioners of the Sinking Fund June 30, 1909, with permits to sublet to Manhattan Navigation Company. That the so-called outer 700 feet of the said pier commenced at

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a point about 150 feet west of Twelfth Avenue and included all of the portions of Fortieth Street from said point 150 feet west of Twelfth Avenue to Thirteenth Avenue.

LXV. Upon information and belief that The City of New York, acting by the Department of Docks and Ferries, by the action of the Commissioner of Docks on or about May 1, 1914, issued a permit to the defendant, Burns Bros., at the pleasure of the Commissioner, to use the land under water for a platform south about 66 feet from West Fortieth Street at a rental of \$365.75, and another permit to said Burns Bros. at the pleasure of the Commissioner, to use and occupy 100 feet of the south side of the inner end of the approach to the pier in West Fortieth Street at a rental of \$1,000 per year, together with the use of plaintiffs' premises as a half slip or basin appurtenant thereto, and that said City of New York has frequently and from time to time since the construction of said pier made other leases and permits for the use of plaintiffs' premises for a half slip or basin adjacent to said pier.

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LXVI. That the said lease to Central Railroad Company of New Jersey and permit to Burns Bros. required the use of that portion of plaintiffs' premises forming the half slip or basin adjacent to said pier and without said premises, said lease and permit would be practically valueless, and said defendants are now and have been and intend in the future to use plaintiffs' said premises as and for said half slip or basin.

LXVII. That daily and at frequent intervals and for long periods of time, during and since the construction of said pier as aforesaid, the defendant,

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The City of New York, its agents, employees, representatives, lessees and tenants and the other defendants have unlawfully and illegally and without the consent of plaintiffs or their predecessor in title entered upon plaintiffs' said premises with boats, floats and water craft and otherwise in using the south side of said pier for mooring, floating and docking said water craft, and deprived plaintiffs and their predecessor in title of the use thereof, and The City of New York has received a large amount  
 113 of rent, income and profits therefrom, and that the said defendants have not made or offered compensation to these plaintiffs or their predecessor in title for the use of their said premises as aforesaid.

LXVIII. Plaintiffs repeat each and every allegation contained in Paragraphs "XL," "XLI," "XLII," "XLIII," "XLIV," "XLV," "XLVI" and "XLVII" of this complaint and make the same a part hereof, the same as if set forth herein at length.

## FOR A THIRD CAUSE OF ACTION.

114

LXIX. Plaintiffs repeat each and every allegation contained in Paragraph "I" of this complaint and make the same a part hereof as if set forth herein at length.

LXX. Upon information and belief that the defendant, Central Railroad Company of New Jersey, is a foreign corporation organized and existing under the Laws of the State of New Jersey, having a place of business in the City, County and State of New York.

LXXI. Upon information and belief that the defendant, New York Stock Yards Company, is a domestic corporation organized and existing under the Laws of the State of New York, with its principal place of business in the City of New York.

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LXXII. Upon information and belief that the defendant, Weehawken Stock Yards Company, is a foreign corporation organized and existing under the Laws of the State of New Jersey, having a place of business in the City, County and State of New York.

LXXIII. That on or about the 24th day of December, 1852, the Mayor, Aldermen and Commonalty of the City of New York, for a specified sum of money and certain covenants and agreements mentioned and contained in a certain grant or conveyance, a copy of which is hereto annexed and marked Schedule "D," duly granted, bargained, sold, aliened, released and conveyed the fee simple absolute unto Robert Latou, his heirs and assigns, all that certain block of land under water to be made land and gained out of the Hudson or North River along and between Twelfth and Thirteenth Avenues, Fortieth and Forty-first Streets in the County and City of New York, together with other property, all of which is described in said Indenture marked Schedule "D," annexed hereto, and made a part hereof as if set forth herein at length.

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LXXIV. Upon information and belief that said grant or conveyance to Robert Latou was duly recorded in the office of the Register of New York County on or about the 3rd day of January, 1853, in Liber 623 of Conveyances, at page 170, and a duplicate or counterpart thereof is on record in the Comptroller's office of the City of New York, in Book II of Grants, at page 117.

LXXV. Thereafter on or about the 12th day of January, 1854, said Robert Latou duly sold and conveyed to plaintiffs' testator, Charles E. Appleby, all of the premises, rights, privileges and emoluments hereinbefore mentioned in paragraph

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"LXXIII," as set forth in Schedule "D," and that said Indenture and conveyance from Robert Latou was duly recorded in the office of New York County and that the said Charles E. Appleby remained the sole and continuous owner in fee simple absolute and in possession, except for the trespasses herein mentioned, of all of said premises, land under water, rights, privileges and emoluments until the date of his death on or about the 15th day of December, 1913.

119

LXXVI. Plaintiffs repeat each and every allegation contained in Paragraph "VI" of this complaint and makes the same a part hereof as if set forth herein at length.

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LXXVII. That upon the death of Charles E. Appleby, on or about the 15th day of December, 1913, the plaintiffs, Edgar S. Appleby and John S. Appleby, became the sole owners in fee simple absolute and in possession, except for the trespasses herein mentioned, of all of the premises hereinbefore mentioned and described in paragraph "LXXIII" hereof and have remained and now are the sole owners in fee simple absolute and in possession, except for the trespasses herein mentioned, of said premises, and of all the easements of light, air and access in the streets and avenues in front of and appurtenant to the said granted premises and the rights, terms, wharfage, cranage, dockage and emoluments appurtenant or belonging thereto.

LXXVIII. That on or about the 12th day of April, 1837, The People of the State of New York, represented in Senate and Assembly, duly enacted Chapter 182 of the Laws of 1837, entitled, "An act to establish a permanent exterior street or avenue in the City of New York, along the easterly shore of

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the North or Hudson's River, and for other purposes."

LXXIX. Said act of 1837 immediately, or very soon thereafter, became a law and at all times mentioned herein and now is in full force and effect in so far as the right and title of these plaintiffs to the premises described in Paragraph "LXXIII" hereof are concerned.

LXXX. That by virtue of the provisions of Chapter 182 of the Laws of 1837, Twelfth and Thirteenth Avenues, Fortieth and Forty-first Streets in front of and adjacent to plaintiffs' premises, and shown in said grants, were duly laid out, created, extended and established as streets and highways and all right and title of the People of the State of New York to the land under water between the westerly side of Thirteenth Avenue and the westerly side of the lands under water theretofore granted to the Mayor, Aldermen and Commonalty of the City of New York, by letters patent, in pursuance of the act entitled, "An act relative to the improvement of the City of New York, passed February 25, 1826," was granted to and vested in the Mayor, Aldermen and Commonalty of the City of New York, and that the said premises which were granted by the People of the State of New York to the Mayor, Aldermen and Commonalty of the City of New York by said act of 1837 included the premises mentioned and described in Paragraph "LXXIII."

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LXXXI. Upon information and belief that on and after April 12, 1837, by virtue of the provisions of said Chapter 182 of the Laws of 1837, Twelfth and Thirteenth Avenues, Fortieth and Forty-first Streets, became, have at all times continued to be and now are public streets and avenues in the City

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of New York. That the title and interest which the City of New York had in and to said streets and avenues was reserved, withheld and owned by the Mayor, Aldermen and Commonalty of the City of New York and its successor, The City of New York in trust for the uses and purposes of public streets, avenues and highways and in trust to maintain said streets and avenues as public streets and avenues are usually maintained, and subject to the private easements and rights granted as aforesaid.

125

LXXXII. Upon information and belief that at the time of the said grant or conveyance to Robert Latou, mentioned in Paragraph "LXXIII" hereof, the said Chapter 182 of the Laws of 1837 was in full force and effect, as aforesaid, and Thirteenth Avenue was the duly laid out and existing permanent and public exterior street along the east shore of the Hudson River, and constituted at all times since 1837 and now constitutes the westerly boundary of plaintiffs' said lands under water, and Twelfth Avenue was duly laid out, continued and extended along its present lines, and Fortieth and Forty-first Streets were duly laid out, continued and extended along the present lines thereof out to said Thirteenth Avenue.

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LXXXIII. Upon information and belief that the said grant or conveyance mentioned in Paragraph "LXXIII" hereof, was made to and accepted by Robert Latou in full faith and reliance upon the provisions of the said Chapter 182 of the Laws of 1837, and the rights and plan of improvement created by said act and the title granted to the Mayor, Aldermen and Commonalty of the City of New York thereby and especially upon the faith of the authority given by said act to said Mayor, Aldermen and Commonalty of the City of New York to grant and



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convey the premises therein mentioned with reference to the plan of improvement and line of solid filling in and by said act created and established. That the provisions of said act and the rights and plan of improvement therein created constituted an integral part of the contract consummated by the grant of the premises set forth in Paragraph III hereof. Among the rights created in and by said act was the right to fill in at the pleasure of said Charles E. Appleby and his heirs and assigns the premises out to said Thirteenth Avenue without having to obtain permission from said Mayor, Aldermen and Commonalty of the City of New York so to do and said Thirteenth Avenue was upon the taking effect of said act in 1837 and continued to be to and after the making of the grant set forth in Paragraph III hereof the permanent ripa or line out to which solid filling could be made, and that said Robert Latou paid to the Mayor, Aldermen and Commonalty of the City of New York a stated sum of money, which was the then value of said premises, and made certain covenants in said grant, and the Mayor, Aldermen and Commonalty of the City of New York received said payment and covenants and made said grant or conveyance under and by virtue of the said Chapter 182 of the Laws of 1837, with the full and complete knowledge and understanding that said grantee, Robert Latou, relied thereon.

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LXXXIV. Upon information and belief that upon the execution and delivery of the said grant or conveyance to Robert Latou, title in fee simple absolute to the lands under water and premises between Twelfth and Thirteenth Avenues, Fortieth and Forty-first Streets vested in said Robert Latou, his heirs and assigns, and also private easements

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of light, air and access in said streets and avenues, and certain right and privileges of wharfage, cranage and dockage and the sole and exclusive right to build the streets and avenues vested in said Robert Latou, his heirs and assigns, and the plaintiffs are now the owners in fee simple absolute of said premises and of the said easements, rights and privileges.

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LXXXV. That neither the plaintiffs nor any of their predecessors in title have been required to build or erect said streets, wharves or bulkheads forming part or portions or whole of Twelfth and Thirteenth Avenues, Fortieth and Forty-first Streets, shown on the said grant or conveyance marked Schedule "D" herein.

LXXXVI. That plaintiffs and their testator or predecessors in title have duly kept and performed and complied with all articles, covenants and agreements contained in said grant to Robert Latou, which he or they or any of them were on their part to keep or perform.

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LXXXVII. That the plaintiffs and their testator and predecessor in title had and have a right under said grant and under the Laws of the State of New York to fill in all of said land under water between Fortieth and Forty-first Streets, Twelfth and Thirteenth Avenues, shown on the map in Schedule "D" herein, and to reclaim it from the river and make it dry land.

LXXXVIII. That neither of the plaintiffs nor their predecessors in title have ever parted by grant, agreement, condemnation proceedings or otherwise of any right, title or interest in or to said lands under water and premises mentioned in Paragraph "LXXIII" of this complaint, of any rights,

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privileges, easements or emoluments therein or appurtenant thereto, nor has compensation ever been made to the plaintiffs or their predecessors in title for any invasion of any right, title or interest, privilege or easements in or appurtenant to said lands and premises.

LXXXIX. Plaintiffs repeat each and every allegation contained in Paragraphs "XIX" and "XX" of this complaint, and makes the same a part hereof as if set forth herein at length.

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XC. Upon information and belief that on or about the 27th day of April, 1871, pursuant to the said Statutes of 1870 and 1871, the said Commissioners of the Sinking Fund approved a plan for the improvement of the water front in the North or Hudson River, which plan was theretofore submitted to said commissioners by the said Board of the Department of Docks, and said plan included plaintiffs' said land under water between Twelfth and Thirteenth Avenues, Fortieth and Forty-first Streets.

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XCI. Upon information and belief that in and by said plan, a marginal wharf or so-called street was laid out and proposed over plaintiffs' said property. Said proposed marginal wharf or street was to be 250 feet wide, and included all of Twelfth Avenue and so much of plaintiffs' property as lay west of Twelfth Avenue and within a distance of 150 feet therefrom, and it was proposed by said plan that said marginal street or wharf should be the limit of solid filling and that no lands under water west of said marginal street should be filled in.

XCII. Upon information and belief that said plan further proposed and laid out a pier to commence at a point in West Fortieth Street at the new

- proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within Fortieth Street and to extend west about 500 feet into the Hudson or North River. Said plan also proposed to change the actual and legal foot of Fortieth Street from the westerly line or side of Thirteenth Avenue to the westerly side of the proposed marginal wharf or street. Said plan also proposed that said pier should coincide practically with the lines of said
- 137 Fortieth Street and occupy all of the land in the street, and that the plaintiffs' said premises between Twelfth and Thirteenth Avenues and adjoining said pier and extending half way to Forty-first Street, should become, and be used as, a slip or basin for boats, floats and water craft in arriving at, remaining and departing from said pier, and said plan necessarily contemplated the appropriation of plaintiffs' premises and their right to fill in same and make dry land and also the destruction of their easements in the streets and their wharfage rights
- 138 at Thirteenth Avenue, and necessarily would prevent them from performing their covenants to fill in the streets, and take away their right to fill in the same.

XCIH. Plaintiffs repeat each and every allegation contained in Paragraphs "XXIV," "XXV," "XXVI," "XXVII," "XXVIII," "XXIX," "XXX," "XXXI" and "XXXII" of this complaint, and make the same a part hereof as if set forth herein at length.

XCIV. Upon information and belief that during the pendency of the aforesaid condemnation proceeding, without the consent and against the will of the plaintiffs and their predecessors in title, and without acquiring the right so to do in any manner

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and without compensation, The City of New York, by its agents, servants, employees, contractors and representatives on or about the 29th day of December, 1911, purporting to be acting under the plan hereinbefore mentioned, erected and constructed or caused to be erected and constructed a pier which is a permanent structure of concrete and steel approximately within the lines of West Fortieth Street beginning at a point about 4 feet east of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue and on or about the 21st day of June, 1912, erected or constructed or caused to be erected or constructed on said pier an iron or steel shed, partly one story and partly two stories in height, and the north and south walls of said shed are erected or attached to said pier and practically along the north and south lines of Fortieth Street. 140

XCIV. Plaintiffs repeat each and every allegation contained in Paragraphs "LIV," "LV," "LVI," "LVII," "LVIII" and "LIX" of this complaint and make the same a part hereof as if set forth herein at length. 141

XCVI. Under and by virtue of the grant or conveyance to Robert Latou mentioned in Paragraph "LXXIII" hereof, said Robert Latou, his heirs and assigns, were vested with the sole and exclusive right to build when required or permitted by the Common Council of the City of New York the streets and avenues therein mentioned and shown. The piers and structures which the City of New York has built or caused to be built in said Fortieth Street between Twelfth and Thirteenth Avenues, interfere with plaintiffs' sole and exclusive right to build the streets, and practically prohibit and destroy that valuable right, and prevents any use by plaintiffs of said premises and render the same

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profitless to plaintiffs as long as said trespass continues, and that plaintiffs are seriously damaged thereby.

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XCVII. The use of the northerly side of said pier for the approach of ships and water craft necessarily required the use of plaintiffs' said premises adjacent thereto as a slip or basin for said pier for the passage of said boats to and from the pier and to moor at said pier for the purpose of loading and unloading at said pier. Such boats using the north side of said pier had and have necessarily to remain and dock or moor and do remain, dock and moor for long periods over and upon plaintiffs' said premises, using it as a slip or basin. The use of plaintiffs' said premises as a slip or basin for the northerly side of said pier was intended by the City of New York and has actually been used by said City and its servants, licensees, lessees and agents as such slip or basin, and all use, benefit and enjoyment thereof by the plaintiffs and their predecessor in title has been and now is prevented. Said pier and shed also impair plaintiffs' easements of light, air and access in Fortieth Street appurtenant to said premises. That plaintiffs are desirous of using their said premises and cannot do so on account of the trespasses of the defendants herein.

XCVIII. Upon information and belief that the defendant, The City of New York, during and since the construction of said pier has frequently, through its agents, contractors and servants, dredged plaintiffs' said land under water without the consent of plaintiffs or their predecessor in title and without acquiring the right so to do. That all of the plaintiffs' premises hereinbefore described have been dredged by frequent removal of the soil to a depth

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of about 16 feet and the defendants intend to continue to dredge said premises in the future and to maintain and use the same as a slip or basin. That plaintiffs' premises form and compose the entire half slip or basin adjacent to said pier between Twelfth and Thirteenth Avenues, and so much of said pier is dependent upon the maintenance and use of plaintiffs' premises as a half slip or basin.

XCIX. Upon information and belief that said dredging was done for the purpose of making plaintiffs' said land under water more available as a slip or basin for the north side of said pier.

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C. Plaintiffs repeat each and every allegation contained in Paragraph "LXIV" of this complaint and make the same a part hereof as if set forth herein at length.

CI. Upon information and belief that the City of New York, acting by the Department of Docks and Ferries by the action of the commissioner thereof, on or about May 1, 1911, issued a permit to the defendants, New York Stock Yards Company and Weehawken Stock Yard Company, at the pleasure of the commissioner to use and occupy 250 feet of the north side of the pier in West Fortieth Street, together with the rights of wharfage and access to said pier and the half slip and basin alongside of said portion of said pier at a stated rental of \$350 per month, and that said City of New York has frequently from time to time since the construction of said pier, made other leases and permits for the use of plaintiffs' premises as and for a half slip or basin adjacent to said pier.

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CII. That access to said portions of said pier between Twelfth and Thirteenth Avenues could be had by boats, floats and water craft in no other way

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except over the plaintiffs' said premises and that boats, floats and water craft cannot be moored or remain at said portions of said pier in any other way or manner except by using the plaintiffs' premises as a slip or basin.

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CIII. That the said defendants, Central Railroad Company of New Jersey, New York Stock Yards Company and Weehawken Stock Yard Company have continuously for some years past used plaintiffs' said premises for access to said portions of said pier and are now using the same and intend to continue to use the same in the future for said purposes.

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CIV. That the use of plaintiffs' said premises by the said defendants has been for the defendants own exclusive benefit and enjoyment and the plaintiffs have been deprived of all the use and benefit thereof, and that daily and at frequent intervals and for long periods of time during and since the construction of said piers, the defendant, The City of New York, its agents, employees, representatives, lessees and tenants and the other defendants have unlawfully, illegally and without the consent of the plaintiffs or their predecessor in title entered upon plaintiffs' said premises with boats, floats and water craft and otherwise in using the north side of said pier for mooring, floating and docking water craft, and The City of New York has received a large amount of rent, income and profits therefrom, and neither the City of New York nor the other defendants have made or offered compensation to the plaintiffs or their predecessor in title for the use of their said premises, as aforesaid.

CV. Plaintiffs repeat each and every allegation contained in Paragraphs "XL," "XLI," "XLII,"



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"XLIII," "XLIV," "XLV," "XLVI" and "XLVII" of this complaint, and make the same a part hereof as if set forth herein at length.

## FOR A FOURTH CAUSE OF ACTION.

CVI. Plaintiffs repeat each and every allegation contained in Paragraph "I" of this complaint and make the same a part hereof the same as if set forth herein at length.

CVII. Plaintiffs repeat each and every allegation contained in Paragraph "LIX" of this complaint and make the same a part hereof as if set forth herein at length. 152

CVIII. Plaintiffs repeat each and every allegation contained in Paragraphs "LXXIII" "LXXIV," "LXXV," "LXXVI," "LXXVII," "LXXVIII," "LXXIX," "LXXX," "LXXXI," "LXXXII" "LXXXIII," "LXXXIV," "LXXXV," "LXXXVI," "LXXXVII" and "LXXXVIII" of this complaint and make the same a part hereof as if set forth herein at length. 153

CIX. Plaintiffs repeat each and every allegation contained in Paragraphs "XIX," "XX," "XC" and "XCI" and make the same a part hereof as if set forth herein at length.

CX. Upon information and belief that said plan further proposed and laid out a pier to commence at a point in West Forty-first Street, at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within Forty-first Street and to extend west about 500 feet into the Hudson or North River. Said plan also proposed to change the actual and legal foot of Forty-first Street from the

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westerly line or side of Thirteenth Avenue to the westerly side of the proposed marginal wharf or street. Said plan also proposed that said pier should coincide practically with the lines of said Forty-first Street and occupy all of the land in the street, and that the plaintiffs' said premises between Twelfth and Thirteenth Avenues, and adjoining said pier and extending half way to Fortieth Street, should become and be used, as a slip or basin, for boats, floats and water craft in arriving at, remain-  
 155 ing and departing from said pier, and said plan necessarily contemplated the appropriation of plaintiffs' premises and their right to fill in the same and make dry land, and the destruction of plaintiffs' easements in the streets and their wharfage rights at Thirteenth Avenue, and necessarily would prevent them from performing their covenants to fill in the streets, and take away their right to fill in the same.

CXI. Plaintiffs repeat each and every allegation contained in Paragraphs "XXIV," "XXV,"  
 156 "XXVI," "XXVII," "XXVIII," "XXIX," "XXX," "XXXI" and "XXXII" of this complaint and make the same a part hereof as if set forth herein at length.

CXII. Upon information and belief that during the pendency of the aforesaid condemnation proceeding, without the consent and against the will of the plaintiffs and their predecessors in title and without acquiring the right so to do in any manner and without compensation, the City of New York, by its agents, servants, employees, contractors and representatives on or about the 26th day of November, 1904, purporting to act under the plan hereinbefore mentioned, erected and constructed or caused to be erected or constructed, a pier which is a per-

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manent structure approximately within the lines of West Forty-first Street and occupying all the land in West Forty-first Street between Twelfth and Thirteenth Avenues, which pier begins at a point about 4 feet east of Twelfth Avenue and extends westerly to and beyond Thirteenth Avenue, which pier is about 954 feet in length.

CXIII. Upon information and belief that on or about the 5th day of July, 1906, the City of New York and Eben E. Olcott or their agents, servants, lessees, contractors or representatives erected and constructed or caused to be erected and constructed, presumably under the Shedding Act of 1875, to wit, Chapter 249 of the Laws of 1875, an iron and steel shed one and two stories in height upon said pier in Forty-first Street and said shed begins at a point about 150 feet west of Twelfth Avenue and extends to and beyond Thirteenth Avenue.

158

CXIIIa. Upon information and belief that in or about the year 1912 the defendants herein erected and built or caused to be erected and built a fence and gate extending entirely across West Forty-first Street at or about Twelfth Avenue, thereby depriving plaintiffs and their predecessors in title of access to their said premises hereinbefore mentioned in Paragraph "LXXIII" of this complaint.

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CXIV. That said pier has numerous doors and windows on the sides thereof, which open directly in front of and on plaintiffs' premises. That said doors were placed on the sides of said pier so that boats moored and fastened alongside of said pier and over plaintiffs' premises, could discharge their cargo and freight into said shed.

CXV. That ever since the construction of said pier and shed, boats, floats and water craft have

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been continually, and now are docking and mooring upon and over plaintiffs' premises and the defendants herein intend to continue said acts in the future.

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CXVI. That the sides of said pier and shed practically coincide with the street lines and it is impossible for any boats, floats or water craft to moor, float or remain alongside of said pier between Twelfth and Thirteenth Avenues without mooring, floating and remaining over and upon plaintiffs' premises and using plaintiffs' premises as a slip or basin for said pier and for access to said pier.

CXVII. That the southerly side of said pier between Twelfth and Thirteenth Avenues could not be used by boats, floats and water craft, except by appropriating and using plaintiffs' premises as a slip or basin and as access to said pier.

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CXVIII. That the plaintiffs own and possess easements of light, air and access in Forty-first Street between Twelfth and Thirteenth Avenues, and that the construction of said pier and shed impairs and interferes with said light, air and access and constitutes a taking thereof.

CXIX. That the construction of said pier and shed between Twelfth and Thirteenth Avenues in Forty-first Street, was unlawfully without the consent and against the will of the plaintiffs or their predecessors in title and prevents the exercise by the plaintiffs of their exclusive right to build said streets and constitutes a taking of said privilege, which is a valuable right granted to their predecessor in title by the City of New York.

CXX. Upon information and belief that said pier was constructed in Forty-first Street, is now standing and has been since the date of its construction

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and now is illegally maintained by the City of New York.

CXXI. Under and by virtue of the grant or conveyance to Robert Latou mentioned in Paragraph "LXXIII" hereof, said Robert Latou, his heirs and assigns were vested with the sole and exclusive right to build, when required or permitted by the Common Council of the City of New York, the streets and avenues therein mentioned and shown. The piers and structures which the City of New York has built or caused to be built in said Forty-first Street between Twelfth and Thirteenth Avenues interfere with plaintiffs' sole and exclusive rights to build the streets, and practically prohibit and destroy that valuable right, and necessarily prevented and prevent plaintiffs from filling in and using their said premises, and that plaintiffs are seriously damaged thereby.

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CXXII. The use of the southerly side of said pier for the approach of ships and water craft necessarily required the use of plaintiffs' said premises adjacent thereto as and for a slip or basin for said pier for the passage of said boats to and from the pier and to moor at said pier for the purpose of loading and unloading at said pier. Such boats using the south side of said pier had and have necessarily to remain and dock or moor and do remain, dock and moor for long periods over and upon plaintiffs' said premises using it as a slip or basin, preventing any use thereof by plaintiffs and rendering it profitless to them. The use of plaintiffs' said land under water as a slip or basin for the southerly side of said pier was intended by the City of New York and has actually been used by said City and its servants, licensees, lessees and agents as such slip or basin, and all use, benefit and enjoy-

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ment thereof by the plaintiffs and their predecessors in title has been and now is prevented. Said pier also impairs plaintiffs' easements of light, air and access in Forty-first street appurtenant to their said premises. That plaintiffs are desirous of using their said premises and cannot do so on account of the trespasses of the defendants herein.

167

CXXIII. Upon information and belief that the defendant, The City of New York, during and since the construction of said pier, has frequently, through its agents, contractors and servants, dredged plaintiffs' said land under water without the consent of plaintiffs or their predecessor in title and without acquiring the right so to do. That all of the plaintiffs' premises hereinbefore described have been dredged by frequent removal of the soil to a depth of about 16 feet and the defendants intend to continue to dredge said premises in the future and to maintain and use the same as a slip or basin. That plaintiffs' premises form and compose the entire half slip or basin adjacent to said pier between Twelfth and Thirteenth Avenues, and so much of said pier is dependent upon the maintenance and use of plaintiffs' premises as a half slip or basin.

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CXXIV. Upon information and belief that said dredging was done for the purpose of making plaintiffs' said land under water more available as a slip or basin for the south side of said pier.

CXXV. Upon information and belief that the City of New York, acting by the Department of Docks and Ferries by the action of the Commissioner thereof, on or about the 12th day of December, 1903, the 28th day of November, 1904 and the 31st day of January, 1905, approved by the

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Commissioners of the Sinking Fund December 16, 1903, leased to Eben E. Olcott with permission to sublet a portion to Central Railroad Company of New Jersey, the southerly side outer end and surface on pier in and at West Forty-first Street, together with 75 feet on the northerly side outer end, together with wharfage rights and access to said pier and the use of the half slip or basin adjoining, for a period of ten years from November 28, 1904 to November 28, 1914, and another ten years renewal from November 28, 1914 to November 28, 1924, at a rental of \$8,000 per annum for the first period and \$8800 per annum for the second period. 170

CXXVI. That the defendants, Eben E. Olcott and the Central Railroad Company of New Jersey, took possession of said premises under said lease, have been using, are now using and intend to continue to use the same in the future.

CXXVII. Upon information and belief that the City of New York, acting by the Department of Docks and Ferries by the action of the Commissioner thereof on or about the 2nd day of June, 1909, approved by the Commisisoners of the Sinking Fund June 11, 1909, leased to the Central Railroad Company of New Jersey the southerly side, inner end and surface, of the pier in West Forty-first street for a distance of 95 feet, together with the wharfage rights and access to said pier for a period from July 1, 1909 to November 28, 1914, and a renewal period from November 28, 1914 to November 28, 1924, at a rental of \$1,200 per annum for the first period and \$1,320 per annum for the second period. 171

CXXVIII. Upon information and belief that the City of New York, acting by the Department

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- of Docks and Ferries by the action of the Commissioner thereof on or about the 8th day of August, 1911 and May 1, 1912, issued a permit to the Central Railroad Company of New Jersey at the pleasure of the Commissioner to occupy the 158 feet of south side inner end of pier in West Forty-first Street at a rental of \$1,995.80 per annum and on or about October 2, 1913, by the action of the Commissioner of Docks which was approved by the Commissioners of the Sinking Fund on or about October 29, 1913, leased to the Central Railroad Company of New Jersey from November 1, 1913 to November 28, 1914, the said 158 feet, together with wharfage rights and access to said pier for a stated sum and a privilege of a renewal for ten years from November 28, 1914 to November 28, 1924, at a rental of \$2,195.38 per annum, and that said City of New York has frequently from time to time since the construction of said pier made other leases and permits for the use of plaintiffs' premises as and for a half slip or basin adjacent to said pier.
- 173
- 174 CXXIX. That the Central Railroad Company of New Jersey entered into possession of said premises under said lease, have been, now are and intend to remain in possession and have been continuously using plaintiffs' said premises and intend to continue to do so in the future.
- CXXX. That all of the aforesaid leases and permits are valueless, inside of Thirteenth Avenue, except that the plaintiffs' premises are used for slips and basins in giving access to said piers and furnishing basins for boats, floats and water craft to moor and remain alongside of said pier.
- CXXXI. That said leases were made without the knowledge and consent or approval of the plaintiffs or their predecessors in title.



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CXXXII. That the use of plaintiffs' said premises by the said defendants has been for the defendants own exclusive benefit and enjoyment and the plaintiffs have been deprived of all the use and benefit thereof, and that daily and at frequent intervals and for long periods of time during and since the construction of said piers, the defendant, The City of New York, its agents, employees, representatives, lessees and tenants and the other defendants have unlawfully, illegally and without the consent of the plaintiffs or their predecessor in title entered upon said premises with boats, floats and water craft and otherwise in using the south side of said pier for mooring, floating and docking water craft, and the City of New York has received a large amount of rent, income and profits therefrom, and neither the City of New York nor the other defendants have made or offered compensation to the plaintiffs or their predecessor in title for the use of their said premises, as aforesaid.

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CXXXIII. Plaintiffs repeat each and every allegation contained in paragraphs "XL," "XLI," "XLII," "XLIII," "XLIV," "XLV," "XLVI," and "XLVII" of this complaint and make the same a part hereof as if set forth herein at length.

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WHEREFORE, plaintiffs demand judgment against the defendants and each of them as follows:

(1) That the defendants and each of them be enjoined and restrained from mooring, docking and floating boats over plaintiffs' premises hereinbefore mentioned and described, and from exercising, claiming and asserting any easement, right, title or interest in, over or upon said premises for the floating, mooring and docking of boats and from interfering in any manner with the use and enjoyment

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of said premises by the plaintiffs, their lessees and assigns, and from dredging and removing the soil of plaintiffs' said premises or in any manner using plaintiffs' said premises as slips or basins, and

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(2) That the defendant, The City of New York, be compelled to take down, remove all piers, sheds, platforms, runways, gates, fences, posts and columns and all other structures in West Thirty-ninth, West Fortieth and West Forty-first Streets, between Twelfth and Thirtieth Avenues, and across said streets at or near Twelfth Avenue, which interfere with the free and unobstructed use of said streets as public highways, or which impair the plaintiffs' right to fill in and make said streets when permitted or required, or which interfere with plaintiffs' easements of light, air and access in said streets and which prevent the plaintiffs from filling in their premises between said streets, and

180

(3) That the plaintiffs recover of and from the City of New York, the damages sustained by the trespass upon their said premises, which amount plaintiffs allege is at the rate of upwards of \$25,000 per annum in each and every cause of action herein set forth during the respective periods mentioned in said causes of action, and

(4) For such other and further relief as to the Court may seem just and proper, together with the costs and expenses of this action.

BANTON MOORE,  
Attorney for Plaintiffs,  
Office and Post Address,  
1 Liberty Street,  
Borough of Manhattan,  
City of New York.

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STATE OF NEW YORK,    }  
COUNTY OF NEW YORK, } ss.:

Edgar S. Appleby and John S. Appleby, being duly sworn, says that they are the plaintiffs in the above entitled action; that the foregoing complaint is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters they believe it to be true.

EDGAR S. APPLEBY,  
JOHN S. APPLEBY.

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Sworn to before me this }  
26th day of May, 1915. }

GEO. B. LAUCK,  
Notary Public, Kings Co.  
Certf. filed in N. Y. Co.

The schedules referred to in the foregoing complaint will be found printed in the volume of exhibits (Vol. II of the record), of which

Schedule A as Plaintiffs' Exhibit 4;  
Schedule B as Plaintiffs' Exhibit 13;  
Schedule C as Plaintiffs' Exhibit 18;  
Schedule D as Plaintiffs' Exhibit 5;  
Schedule E as Plaintiffs' Exhibit 16.

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SUPREME COURT,

NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Ap-  
pleby, deceased,

Plaintiffs,

against

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THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

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The City of New York, one of the defendants  
above named, through Frank L. Polk, Corporation  
Counsel, respectfully shows to this Court and al-  
leges upon information and belief, as and for an  
amended answer to the alleged first cause of action:

1.

Answering the allegations contained in paragraph  
1, it denies that The City of New York is bound  
by all the covenants and obligations contained in  
or created by two certain deeds or grants made by  
the Mayor, Aldermen and Commonalty of the City  
of New York, mentioned in said complaint.

2.

It admits the allegations contained in paragraph  
II.

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3.

Upon information and belief it denies the allegations contained in paragraph III.

4.

It admits the allegations contained in paragraph IV.

5.

It denies the allegations contained in paragraph V.

188

6.

It admits the allegations contained in paragraph VI.

7.

Upon information and belief it denies the allegations contained in paragraph VII.

8.

It admits the allegations contained in paragraph VIII.

9.

189

Upon information and belief it denies the allegations in paragraph IX.

10.

It admits the allegations in paragraph X.

11.

Upon information and belief it denies the allegations contained in paragraph XI.

12.

It admits the allegations contained in paragraph XII and alleges that the said streets and avenues

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in said paragraph mentioned have never been physically constructed and opened.

13.

It denies the allegations contained in paragraph XIII.

14.

It denies the allegations contained in paragraph XIV.

191

15.

It admits the allegations contained in paragraph XV.

16.

It denies the allegations contained in paragraph XVI.

17.

It denies the allegations contained in paragraph XVII.

192

18.

It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XVIII.

19.

It admits the allegations contained in paragraphs XIX, XX, XXI, and XXII.

20.

Answering the allegations in paragraph XXIII, it admits that said plan proposed and laid out a pier to commence at a point in West Thirty-ninth Street at the new proposed westerly side of said

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proposed marginal wharf or street to occupy all of the land and space within Thirty-ninth Street and to extend west about 500 feet into the Hudson or North River. Upon information and belief it denies all the rest and residue of the allegations in said paragraph contained.

21.

It admits the allegations contained in paragraphs XXIV, XXV, XXVI, XXVII, XXVIII and XXIX.

22.

194

It admits the allegations contained in paragraph XXX, except that it denies that the proceeding therein mentioned is still pending and undetermined.

23.

It admits the allegations contained in paragraph XXXI, except it denies that the appointment of Commissioners could and can only be made by the Corporation Counsel and that it is the duty of the Corporation Counsel to make such application.

195

24.

It admits the allegations contained in paragraph XXXII.

25.

It admits the allegations contained in paragraph XXXIII, except that it denies that said structures are maintained unlawfully and illegally.

26.

It denies the allegations contained in paragraphs XXXIV and XXXV.

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27.

It admits the allegations contained in paragraph XXXVI, except that it denies on information and belief that the dredging was done without the consent of the plaintiffs or their predecessor in title and without acquiring the right to do so.

28.

197

Upon information and belief it denies the allegations contained in paragraph XXXVII.

29.

It admits the allegations contained in paragraphs XXXVIII and XXXIX, except that it denies that The City of New York has frequently made other leases and permits for the use of plaintiffs' premises as and for a half slip or basin adjacent to said pier as alleged in paragraph XXXIX.

30.

198

It denies the allegations contained in paragraphs XL, XLI, XLII, XLIII, XLIV, XLVI and XLVII.

31.

It admits the allegations contained in paragraph XLV.

AS AND FOR AN AMENDED ANSWER TO THE ALLEGED SECOND CAUSE OF ACTION :

32.

Answering the allegations contained in paragraph XLVIII, it repeats each and every allegation set forth in paragraph 1 of this answer, as if set forth herein at length.

33.

It admits the allegations in paragraph XLIX.



34.

Answering the allegations in paragraph L, it repeats each and every allegation contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of its answer, and makes the same a part hereof as if set forth herein at length.

35.

In answering the allegations in paragraph LI, it admits that said plan further proposed and laid out a pier to commence at a point in West 40th Street at the new proposed westerly side of said proposed marginal wharf or street which pier was to occupy all of the land and space within Fortieth Street and to extend west about 500 feet into the Hudson or North River. Upon information and belief it denies all the rest and residue of the allegations in said paragraph contained.

200

36.

Answering the allegations in paragraph LII it repeats each and every allegation contained in paragraphs 21, 22, 23, and 24 of its answer and makes the same a part hereof as if set forth herein at length.

201

37.

It admits the allegations in paragraphs LIII, LIV, LV and LVI, except that it denies that the use of plaintiffs' land under water is the sole means of access to said pier.

38.

It denies the allegations in paragraphs LVII, LVIII and LIX.

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39.

Upon information and belief it denies the allegations in paragraphs LX, LXI, and LXIII, and it admits the allegations contained in paragraph LXII, except that it denies on information and belief that the dredging was done without the consent of the plaintiffs or their predecessor in title and without acquiring the right to do so.

40.

203

It admits the allegations in paragraphs LXIV and LXV.

41.

It denies the allegations in paragraphs LXVI and LXVII, except that it admits that it has not made or offered compensation to the plaintiffs or their predecessors in title.

42.

204 Answering the allegations in paragraph LXVIII it repeats each and every allegation contained in paragraphs 30 and 31 of its answer and makes the same a part hereof, the same as if set forth herein at length.

AS AND FOR AN AMENDED ANSWER TO THE ALLEGED THIRD CAUSE OF ACTION THIS DEFENDANT ALLEGES:

43.

Answering the allegations contained in paragraph LXIX it repeats each and every allegation in paragraph 1 of this answer and makes the same a part hereof as if set forth herein at length.

44.

It admits the allegations in paragraphs LXX, LXXI, LXXII.

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45.

It denies the allegations contained in paragraph LXXIII.

46.

It admits the allegations in paragraph LXXXIV.

47.

It denies the allegations in paragraph LXXV.

48.

Answering the allegations in paragraph LXXVI it repeats each and every allegation in paragraph 6 of its answer and makes the same a part hereof as if set forth herein at length.

49.

It denies the allegations in paragraph LXXVII.

50.

It admits the allegations in paragraph LXXVIII.

51.

It denies the allegations in paragraph LXXIX.

52.

It admits the allegations in paragraph LXXX.

53.

It denies the allegations in paragraph LXXXI.

54.

It admits the allegations in paragraph LXXXII, and alleges that the said streets and avenues in said paragraph mentioned have never been physically constructed and opened.

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55.

It denies the allegations in paragraph LXXXIII.

56.

It denies the allegations in paragraph LXXXIV.

57.

It admits the allegations in paragraph LXXXV.

58.

209 It denies the allegations in paragraphs LXXXVI and LXXXVII.

59.

It denies that it has any knowledge or information sufficient to form a belief as to the allegations in paragraph LXXXVIII.

60.

210 Answering the allegations in paragraph LXXXIX it repeats each and every allegation in paragraph 19 of its answer and makes the same a part hereof as if set forth herein at length.

61.

It admits the allegations in paragraphs XC and XCI.

62.

Answering the allegations in paragraph XCII it admits that said plan further proposed and laid out a pier to commence at a point in West Fortieth Street at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within Fortieth Street and to extend west about 500 feet into the Hudson or North River. Upon information and

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belief it denies the rest and residue of the allegations in said paragraph.

63.

Answering the allegations in paragraph XCIII it repeats each and every allegation in paragraphs 21, 22, 23 and 24 of its answer and makes the same a part hereof as if set forth herein in full.

64.

It admits the allegations in paragraph XCIV. 212

65.

Answering the allegations in paragraph XCV it repeats each and every allegation in paragraphs 37 and 38 of its answer and makes the same a part hereof as if set forth herein at length.

66.

It denies the allegations in paragraphs XCVI and XCVII.

67.

213

It admits the allegations in paragraph XCVIII, except that it denies upon information and belief the dredging was done without the consent of the plaintiffs or their predecessor in title and without acquiring the right so to do.

68.

It denies the allegations in paragraph XCIX.

69.

Answering the allegations in paragraph C, it repeats each and every allegation contained in paragraph 40 of its answer and makes the same a part hereof as if set forth herein at length.

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70.

It admits the allegations in paragraph CI.

71.

It denies the allegations in paragraphs CII, CIII, and CIV.

72.

215 Answering the allegations in paragraph CV it repeats each and every allegation in paragraphs 30 and 31 of its answer and makes the same part hereof as if set forth herein at length.

AS AND FOR AN AMENDED ANSWER TO THE ALLEGED FOURTH CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THIS DEFENDANT ALLEGES:

73.

Answering the allegations in paragraph CVI it repeats each and every allegation set forth in paragraph 1 of this answer as if set forth herein at length.

74.

Answering the allegations of paragraph CVII it repeats each and every allegation set forth in paragraph 44 of this answer as if set forth herein at length.

75.

Answering the allegations of paragraph CVIII it repeats each and every allegation set forth in paragraphs 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of this answer as if set forth herein at length.

76.

Answering the allegations in paragraph CIX it repeats each and every allegation set forth in par-

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agraphs 19 and 61 of this answer as if set forth herein at length.

77.

Answering the allegations in paragraph CX it admits that said plan further proposed and laid a pier to commence at a point in West Forty-first Street at the new proposed westerly side of said proposed marginal wharf or street which pier was to occupy all of the land and space within Forty-first Street and to extend west about 500 feet into the Hudson or North River. Upon information and belief it denies the rest and residue of the allegations in said paragraph.

218

78.

Answering the allegations in paragraph CXI it repeats each and every allegation set forth in paragraphs 21, 22, 23 and 24 of this answer and makes the same part hereof as if set forth herein at length.

79.

It admits the allegations contained in paragraph CXII except that it denies that such pier is constructed of concrete and steel.

219

80.

It admits the allegations in paragraphs CXIII, CXIV, CXV and CXVI, except that it denies using plaintiffs' premises as a slip or basin for said pier and for access to said pier.

81.

It denies the allegations in paragraphs CXVII, CXVIII, CXIX, CXX, CXXI and CXXII.

82.

It admits the allegations in paragraph CXXIII,

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except that it denies upon information and belief the dredging was done without the consent of the plaintiffs or their predecessor in title and without acquiring the right so to do.

83.

It denies the allegations in paragraph CXXIV.

84.

221 It admits the allegations in paragraphs CXXV, CXXVI, CXXVII and CXXVIII.

85.

It admits the allegations in paragraph CXXIX except that it denies that it or the Central Railroad Company of New Jersey have been continually using plaintiffs' premises and continue to do so in the future.

86.

It denies the allegations in paragraph CXXX.

222

87.

It admits the allegations in paragraph CXXXI.

88.

Answering the allegations in paragraph CXXXII it repeats each and every allegation set forth in paragraphs 30 and 31 of this answer and makes the same a part hereof as if set forth herein at length.

89.

It denies each and every allegation contained in said complaint not hereinbefore specifically admitted or denied.



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AS FOR A FIRST SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY ALLEGED CAUSE OF ACTION SET FORTH IN THE COMPLAINT THIS DEFENDANT ALLEGES:

90.

That the plaintiffs have a full and adequate remedy at law.

AS AND FOR A SECOND SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY ALLEGED CAUSE OF ACTION SET FORTH IN THE COMPLAINT, THIS DEFENDANT ALLEGES:

224

91.

The Mayor, Aldermen and Commonalty of the City of New York was, prior to the first day of January, 1898, a municipal corporation existing under and by virtue of its ancient charters and acts of the Legislature of the State of New York.

92.

Such corporation by virtue of its ancient charters, letters patent and acts of the Legislature of the State of New York was prior to the year 1850 vested with the title to the lands under water of the North or Hudson River, between Thirty-ninth and Forty-first Streets in trust for the benefit of the public and that such title was subject to the control of the Legislature of the State of New York and to the control of Congress of the United States of America as to the use and disposition of said lands under water.

225

93.

The title of the predecessors of the plaintiffs, as conveyed to them by the water grants set forth in and attached to the complaint as Schedules "A"

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and "D" was likewise subject to the same control by the People of the State of New York and by Congress of the United States.

94.

The People of the State of New York enacted Chapter 121 of the Laws of 1855 entitled "An Act for the appointment of a commission for the preservation of the harbor of New York from encroachments and to prevent obstructions to the necessary navigation thereof.

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95.

Under and pursuant to the provisions of this act the Commissioners appointed by the Governor of the State of New York did recommend, submit and present to the Legislature, the establishment of such exterior lines, in different parts of the said harbor, opposite and along the waterfronts of the cities of New York and Brooklyn, the County of Kings and County of Richmond and beyond which no erection or permanent obstruction of any kind should be permitted to be made.

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96.

The exterior lines so recommended by said Commissioners were ratified and confirmed by the Legislature of the State of New York by Chapter 763 of the Laws of 1857 entitled An act to establish bulkhead and pierhead lines for the port of New York.

97.

The bulkhead line recommended by said Commissioners under and pursuant to the provisions of Chapter 121 of the Laws of 1855 and ratified and confirmed by Chapter 763 of the Laws of 1857,

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was located over and across the premises involved in this action one hundred feet westerly of the westerly line of Twelfth Avenue.

98.

The predecessors in title of plaintiffs were by the provisions of this act prohibited from filling in the premises involved in this action beyond the bulkhead line so established and the Mayor, Aldermen and Commonalty were prohibited from requiring the predecessors in title of the plaintiffs from making and building Thirty-ninth, Fortieth, Forty-first Streets and Thirteenth Avenue exterior to and beyond the bulkhead line so established.

230

99.

The Mayor, Aldermen and Commonalty of the City of New York were, by Chapter 574 of the Laws of 1871, authorized to adopt a plan for the improvement of the waterfront of the City of New York which was to be the sole plan for such improvement and said act prohibited any improvement of the waterfront except in accordance with such plan subsequent to its adoption by the City authorities.

231

100.

The Mayor, Aldermen and Commonalty of the City of New York, under and pursuant to the provisions of said Chapter 574 of the Laws of 1871, did duly adopt a plan for the improvement of the waterfront of the City of New York and thereby established a bulkhead line or line of solid filling across the premises involved in this action along a line 150 feet westerly from the westerly side of Twelfth Avenue.

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101.

The Secretary of War of the United States of America did, under and pursuant to authority vested in him by Congress, duly established, in the year 1890, a bulkhead line across the premises involved in this action which said bulkhead line was coincident with the bulkhead line established by The Mayor, Aldermen and Commonalty of the City of New York under and pursuant to the provisions of Chapter 574 of the Laws of 1871.

233

102.

The bulkhead lines established as set forth in paragraphs 100 and 101 are the existing and present bulkhead lines along the water front of the City of New York on the North River and across the premises involved in this action.

103.

234

At all the times mentioned herein and up to the date of this answer none of the premises covered by the water grants set forth in the complaint have been filled in and improved by the plaintiffs or their predecessors in title beyond about the easterly side of Twelfth Avenue.

104.

After the adoption of the plan for the improvement of the water front in the year 1871, and the establishment by the Secretary of War of the bulkhead line as hereinbefore set forth, the predecessors in title of the plaintiffs were and the plaintiffs are prohibited from filling in the premises involved in this action and The Mayor, Aldermen and Commonalty of the City of New York and The City of New York, this defendant, the successor corporation of the Mayor, Aldermen and Commonalty of the City is prohibited from enforcing the covenants

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contained in the water grants set forth in the complaint relative to making and building Thirty-ninth, Fortieth and Forty-first Streets and Thirteenth Avenue exterior to the bulkhead lines so established.

105.

All of said lines were established more than twenty years prior to the commencement of this action.

AS AND FOR A THIRD SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY OF THE ALLEGED CAUSES OF ACTION SET FORTH IN THE COMPLAINT, THIS DEFENDANT ALLEGES :

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106.

The alleged causes of action set forth in the complaint did not accrue within six years prior to the commencement of this action.

107.

The alleged causes of action set forth in the complaint did not accrue within ten years prior to the commencement of this action.

237

108.

The alleged causes of action set forth in the complaint did not accrue within twenty years prior to the commencement of this action.

AS AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE TO THE FIRST, SECOND AND THIRD ALLEGED CAUSES OF ACTION SET FORTH IN THE COMPLAINT, THIS DEFENDANT ALLEGES :

109.

In or about the year 1850 a pier was built entirely within the lines of Thirty-ninth Street from about

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the easterly line of Twelfth Avenue extending into the North or Hudson River about 300 feet.

110.

239

In or about the year 1890 an action was brought by the Mayor, Aldermen and Commonalty of the City of New York against The New York Central & Hudson River Railroad Company, West Shore and Ontario Terminal Company and John A. Davis, to recover possession of the land and land under water within the lines of Thirty-ninth Street specifically described in the complaint in said action, together with the bulkhead, pier and parts of piers with the buildings and structures thereon erected.

111.

Such proceedings were had in said action that on the 18th day of March, 1891, a judgment was entered in favor of The Mayor, Aldermen and Commonalty of the City of New York for the possession of said premises.

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112.

On appeal, the judgment so entered was affirmed by an order of the General Term entered on the 12th day of May, 1893, and on appeal to the Court of Appeals, the judgment so entered was affirmed on the 25th day of October, 1895.

113.

The Mayor, Aldermen and Commonalty of the City of New York and The City of New York, the successor corporation have since such date occupied, possessed and maintained said pier.

114.

Prior to the 3d day of January, 1900, The City of New York widened said pier to the width of

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Thirty-ninth Street and extended the same out to the pier head line approved by the Secretary of War in the year 1897, a distance of over 650 feet and has ever since occupied, possessed and maintained said pier as widened and extended since such date.

115.

In or about the year 1852, The Mayor, Aldermen and Commonalty of the City of New York constructed a pier entirely within the lines of Fortieth Street from about the easterly side of Twelfth Avenue extending into the North or Hudson River about 450 feet and said pier has been occupied, possessed and maintained by The Mayor, Aldermen and Commonalty of the City of New York and The City of New York since such year.

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116.

Prior to the 15th day of March, 1887, The Mayor, Aldermen and Commonalty of the City of New York widened said pier to the entire width of Fortieth Street and extended the same into the Hudson or North River over 300 feet and said pier so widened and extended has been possessed, occupied and maintained by The Mayor, Aldermen and Commonalty of The City of New York and The City of New York since such date.

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AS AND FOR A FIFTH SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY OF THE ALLEGED CAUSES OF ACTION SET FORTH IN THE COMPLAINT AND BY WAY OF COUNTERCLAIM, THIS DEFENDANT ALLEGES :

117.

The Mayor, Aldermen and Commonalty of the City of New York, prior to the 1st day of January, 1898, was a municipal corporation existing under

and by virtue of its ancient charters and the statutes of the State of New York and by virtue of its ancient charters, letters patent and statutes, was, prior to the year 1850, seized and possessed, subject to the control of the Legislature of the State of New York and to the control of Congress of the United States of America, together with other lands under water, of the lands under water of the North River between the high water mark of said river and Thirteenth Avenue and between Thirty-ninth and Forty-first Streets.

118.

The Mayor, Aldermen and Commonalty of the City of New York in the year 1852 duly issued to Robert Latou, a water grant covering lands under water between Fortieth and Forty-first Streets from high water mark of the Hudson River out to Thirteenth Avenue established by Chapter 182 of the Laws of 1837, a copy whereof is attached to the complaint herein as Schedule D and is made part of this answer as if herein set forth in full and in the year 1853 duly issued to Charles E. Appleby a water grant covering lands under water between Thirty-ninth and Fortieth Streets from high water mark of the Hudson River out to Thirteenth Avenue established by Chapter 182 of the Laws of 1837, a copy whereof is attached to the complaint herein as Schedule A and is made part of this answer as if herein set forth in full.

119.

In said water grants said Robert Latou and Charles E. Appleby for themselves, their heirs and assigns covenanted to pay and satisfy all taxes and



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assessments lawfully imposed or levied upon the granted premises.

120.

The title to the premises covered by the water grant to Robert Latou became by mesne conveyance vested in Charles E. Appleby and the title thus acquired and the title to the premises covered by the water grant to Charles E. Appleby became vested by devise in the plaintiffs herein.

121.

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The City of New York is a municipal corporation existing under and by virtue of the statutes of the State of New York and is the successor corporation of The Mayor, Aldermen and Commonalty of the City of New York.

122.

The Mayor, Aldermen and Commonalty of the City of New York and The City of New York have duly levied taxes and assessments upon said premises.

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123.

Neither the plaintiffs nor their predecessors in title have paid or satisfied the taxes and assessments duly levied upon so much of the premises covered by the water grant to Charles E. Appleby as lie westerly of Twelfth Avenue since the year 1871.

124.

Neither the plaintiffs nor their predecessors in title have paid or satisfied the taxes and assessments duly levied upon so much of the premises covered by the water grant to Robert Latou as lie westerly of Twelfth Avenue since the year 1882.

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*Amended Answer*

WHEREFORE, the defendant, The City of New York, demands judgment

1st. That the complaint herein be dismissed with costs.

2d. That the water grants herein issued to Robert Latou and Charles E. Appleby be declared null and void and be vacated and set aside.

3d. That The City of New York is seized of said premises and entitled to the possession thereof.

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FRANK L. POLK,  
Corporation Counsel,  
Attorney for the Defendant,  
The City of New York,  
Municipal Building,  
Borough of Manhattan,  
New York City.

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**Verification of Answer by Acting Cor- 253**  
**poration Counsel.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
 individually and as Executors of the Last  
 Will and Testament of Charles E. Ap-  
 pleby, deceased,

Plaintiffs,

*against*

THE CITY OF NEW YORK, *et al.*,  
 Defendants.

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STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss.:

LOUIS H. HAHLO, being duly sworn, says that he has been duly designated as Acting Corporation Counsel of The City of New York, and as such that he is an officer of the defendant The City of New York in the above-entitled action; that the foregoing amended answer is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant The City of New York is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the city government, and

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*Verification of Answer*

from statements made to him by certain officers  
or agents of the defendant The City of New York.

LOUIS H. HAHLO.

Sworn to before me, this 21st }  
day of June, 1915. }

MATTHEW F. DUFFY,  
Notary Public,  
Kings Co., No. 105.

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Certificate filed in New York Co., No. 31; Cer-  
tificate filed in Bronx Co., No. 4.

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**Answer to Amended Complaint.**

SUPREME COURT,

NEW YORK COUNTY.

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EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Ap-  
pleby, deceased,

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Plaintiffs,

*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

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Defendant, Weehawken Stock Yard Company,  
by Stetson, Jennings & Russell, its attorneys, an-

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swers the amended complaint herein, and alleges upon information and belief, as follows:

FOR AN ANSWER TO THE FIRST CAUSE OF ACTION:

1. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraph I of the amended complaint.

2. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph II of the amended complaint. 260

3. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph III of the amended complaint.

4. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph IV of the amended complaint.

5. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph V of the amended complaint. 261

6. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph VI of the amended complaint.

7. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraph VII of the amended complaint.

8. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph VIII of the amended complaint.

9. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph IX of the amended complaint.

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*Answer to Amended Complaint*

10. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph X of the amended complaint.

11. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XI of the amended complaint.

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12. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XII of the amended complaint, and alleges that the said streets and avenues in said paragraph mentioned have never been physically constructed and opened.

13. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph XIII of the amended complaint.

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14. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraph XIV of the amended complaint.

15. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XV of the amended complaint.

16. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XVI and XVII of the amended complaint.

17. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph XVIII of the amended complaint.

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18. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraphs XIX, XX, XXI and XXII of the amended complaint.

19. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XXIII of the amended complaint, except that it admits that the said plan proposed and laid out a pier to commence at a point in West 39th Street, at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within 39th Street, and to extend west about 500 feet into the Hudson or North River.

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20. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraphs XXIV, XXV, XXVI, XXVII, XXVIII and XXIX of the amended complaint.

21. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XXX of the amended complaint, except that it denies that the proceeding referred to in said paragraph is still pending and undetermined.

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22. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XXXI of the amended complaint, except that it denies that the appointment of Commissioners of Estimate and Apportionment could and can only be made by the Corporation Counsel, and that it is the duty of the Corporation Counsel to make such application.

23. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of

*Answer to Amended Complaint*

the allegations, or any of them, contained in paragraph XXXII of the amended complaint.

24. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XXXIII of the amended complaint, except that it denies that the pier and structures referred to in said paragraph are remaining and maintained unlawfully and illegally by the City of New York.

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25. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraphs XXXIV and XXXV of the amended complaint.

26. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XXXVI of the amended complaint, except that it denies that the dredging by the defendant, the City of New York, was done without the consent of the plaintiffs or their predecessor in title, and without acquiring the right to do so.

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27. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraph XXXVII of the amended complaint.

28. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraphs XXXVIII and XXXIX of the amended complaint.

29. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraphs XL and XLI of the amended complaint, in so far as they refer to the defendants, the City of New York and Weehawken Stock Yard



*Answer to Amended Complaint*

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Company, and defendant Weehawken Stock Yard Company denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in said paragraphs of the complaint in so far as they refer to tenants and lessees of the defendant, the City of New York, other than said Weehawken Stock Yard Company.

30. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XLII of the amended complaint.

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31. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph XLIII of the amended complaint.

32. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XLIV of the amended complaint.

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33. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph XLV of the amended complaint.

34. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraphs XLVI and XLVII of the amended complaint.

FOR AN ANSWER TO THE SECOND CAUSE OF ACTION :

35. Answering the allegations contained in paragraph XLVIII of the amended complaint, defendant, Weehawken Stock Yard Company repeats each

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and every allegation set forth in paragraph 1 of this answer, as if set forth herein at length.

36. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph XLIX of the amended complaint.

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37. Answering the allegations in paragraph L of the amended complaint, defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of this answer, as if set forth herein at length.

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38. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph LI of the amended complaint, except that it admits that said plan further proposed and laid out a pier to commence at a point in West 40th Street at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within 40th Street and to extend west about 500 feet into the Hudson or North River.

39. Answering the allegations contained in paragraph LII of the amended complaint, defendant, Weehawken Stock Yard Company, repeats each and every allegation set forth in paragraphs 20, 21, 22 and 23 of this answer, as if the same were set forth herein at length.

40. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraphs LIII, LIV and LV of the amended complaint.

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41. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph LVI of the amended complaint, except that it denies the use of the plaintiffs' land under water.

42. Defendant, Weehawken Stock Yard Company, denies the allegations contained in paragraphs LVII, LVIII, LIX, LX and LXI of the amended complaint.

43. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph LXII of the amended complaint, except that it denies that the said dredging was done without the consent of plaintiffs or their predecessor in title and without the right so to do. 278

44. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph LXIII of the amended complaint.

45. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraphs LXIV, LXV and LXVI of the amended complaint. 279

46. Defendant, Weehawken Stock Yard Company, denies the allegations contained in paragraph LXVII of the amended complaint in so far as they refer to the defendants, the City of New York and Weehawken Stock Yard Company, and denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, as to the lessees and tenants of the City of New York other than the defendant Weehawken Stock Yard Company.

*Answer to Amended Complaint*

47. Answering the allegations contained in paragraph LXVIII of the amended complaint the defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraphs 29, 30, 31, 32, 33 and 34 of this answer, as if the same were set forth herein at length.

FOR AN ANSWER TO THE THIRD CAUSE OF ACTION :

281 48. Answering the allegations contained in paragraph LXIX of the amended complaint, defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraph 1 of this answer, as if the same were set forth herein in full.

49. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph LXX of the amended complaint.

282 50. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraphs LXXI and LXXII of the amended complaint.

51. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraph LXXIII of the amended complaint.

52. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph LXXIV of the amended complaint.

53. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph LXXV of the amended complaint.

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51. Answering the allegations contained in paragraph LXXVI of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and realleges the allegations contained in paragraph 6 of this answer, as if set forth herein in full.

55. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph LXXVII of the amended complaint.

56. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph LXXVIII of the amended complaint. 284

57. Defendant, Weehawken Stock Yard Company, denies the allegations contained in paragraph LXXIX of the amended complaint.

58. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph LXXX of the amended complaint.

59. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph LXXXI of the amended complaint. 285

60. Defendant, Weehawken Stock Yard Company admits the allegations contained in paragraph LXXXII of the amended complaint, and alleges that the said streets and avenues in said paragraph mentioned have never been physically constructed and opened.

61. Defendant, Weehawken Stock Yard Company, denies it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph LXXXIII of the amended complaint.

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*Answer to Amended Complaint*

62. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph LXXXIV of the amended complaint.

63. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph LXXXV of the amended complaint.

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64. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraphs LXXXVI and LXXXVII of the amended complaint.

65. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraph LXXXVIII of the amended complaint.

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66. Answering the allegations contained in paragraph LXXXIX of the amended complaint, defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraph 18 as if set forth herein in full.

67. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XC and XCI of the amended complaint.

68. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XCII of the amended complaint, except that it admits that said plan further proposed and laid out a pier to commence at a point in West 40th Street at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within 40th Street and to extend west about 500 feet into the Hudson or North River.

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69. Answering the allegations contained in paragraph XCIII of the amended complaint, defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraphs 20, 21, 22 and 23 of this answer as if set forth herein at length.

70. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XCIV of the amended complaint, except that it denies that the pier and structures referred to in said paragraph are remaining and maintained unlawfully and illegally by The City of New York.

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71. Answering the allegations contained in paragraph XCV of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and alleges each and every allegation contained in paragraphs 40, 41 and 42 of this answer as if set forth herein at length.

72. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraphs XCVI and XCVII of the amended complaint.

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73. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph XCVIII of the amended complaint, except that it denies that the said dredging was done without the consent of plaintiffs or their predecessor in title, and without acquiring the right to do so.

74. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph XCIX of the amended complaint.

75. Answering the allegations contained in paragraph C of the amended complaint, defendant, Wee-

*Answer to Amended Complaint*

hawken Stock Yard Company, repeats and realleges each and every allegation contained in paragraph 45 of this answer, as if set forth herein at length.

76. Defendant, Weehawken Stock Yard Company admits the allegations contained in paragraph CI of the amended complaint.

293 77. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraphs CII, CIII and CIV of the amended complaint.

78. Answering the allegations contained in paragraph CV of the amended complaint defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraphs 29, 30, 31, 32, 33 and 34 of this answer, as if set forth herein at length.

FOR AN ANSWER TO THE FOURTH CAUSE OF ACTION :

294 79. Answering the allegations contained in paragraph CVI of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and realleges each and every allegation contained in paragraph 1 of this answer as if set forth herein at length.

80. Answering the allegations contained in paragraph CVII of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and realleges each and every allegation contained in paragraph 49 of this answer, as if set forth herein at length.

81. Answering the allegations contained in paragraph CVIII of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and realleges each and every allegation contained in para-



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graphs 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64 and 65 of this answer, as if set forth herein at length.

82. Answering the allegations contained in paragraph CIX of the amended complaint, defendant, Weehawken Stock Yard Company, repeats each and every allegation contained in paragraphs 18 and 67 of this answer as if set forth herein at length.

83. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph CX of the amended complaint, except that it admits that said plan further proposed and laid out a pier to commence at a point in West 41st Street at the new proposed westerly side of said proposed marginal wharf or street, which pier was to occupy all of the land and space within 41st Street, and to extend west about 500 feet into the Hudson or North River. 296

84. Answering the allegations contained in paragraph CXI of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and alleges each and every allegation contained in paragraphs 20, 21, 22 and 23 of this answer as if set forth herein at length. 297

85. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph CXII of the amended complaint, except that it denies that the pier and structures therein mentioned are remaining and maintained unlawfully and illegally by the City of New York, and that said pier is constructed of concrete and steel.

86. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph CXIII of the amended complaint.

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*Answer to Amended Complaint*

87. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them contained in paragraph CXIII-a of the amended complaint.

88. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraphs CXIV and CXV of the amended complaint.

299 89. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph CXVI of the amended complaint, except that it denies the use of plaintiffs' premises in connection with the acts set forth in said paragraph.

90. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraphs CXVII, CXVIII, CXIX, CXX, CXXI and CXXII of the amended complaint.

300 91. Defendant, Weehawken Stock Yard Company, admits the allegations contained in paragraph CXXIII of the amended complaint, except that it denies that the said dredging was done without the consent of the plaintiffs or their predecessor in title, and without acquiring the right so to do.

92. Defendant, Weehawken Stock Yard Company, denies the allegations and each of them, contained in paragraph CXXIV of the amended complaint.

93. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in paragraphs CXXV, CXXVI, CXXVII, CXXVIII and CXXIX of the amended complaint.

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94. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph CXXX of the amended complaint.

95. Defendant, Weehawken Stock Yard Company, denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations or any of them contained in paragraph CXXXI of the amended complaint.

96. Defendant, Weehawken Stock Yard Company, denies the allegations, and each of them, contained in paragraph CXXXII of the amended complaint. 302

97. Answering the allegations contained in paragraph CXXXIII of the amended complaint, defendant, Weehawken Stock Yard Company, repeats and realleges each and every allegation contained in paragraphs 29, 30, 31, 32, 33 and 34 of this answer, as if set forth herein at length.

AS AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY ALLEGED CAUSE OF ACTION SET FORTH IN THE AMENDED COMPLAINT, DEFENDANT, WEEHAWKEN STOCK YARD COMPANY, ALLEGES: 303

98. That the plaintiffs have a full and adequate remedy at law.

AS AND FOR A SECOND SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY ALLEGED CAUSE OF ACTION SET FORTH IN THE AMENDED COMPLAINT, DEFENDANT, WEEHAWKEN STOCK YARD COMPANY, ALLEGES:

99. The Mayor, Aldermen and Commonalty of the City of New York was, prior to the first day of January, 1898, a municipal corporation existing

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*Answer to Amended Complaint*

under and by virtue of its ancient charters and acts of the Legislature of the State of New York.

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100. Such corporation by virtue of its ancient charters, letters patent and acts of the Legislature of the State of New York was prior to the year 1850 vested with the title to the lands under water of the North or Hudson River, between 39th and 41st Streets in trust for the benefit of the public and that such title was subject to the control of the Legislature of the State of New York and to the control of Congress of the United States of America and to the use and disposition of said lands under water.

101. The title of the predecessors of the plaintiffs, as conveyed to them by the water grants set forth in and attached to the amended complaint as Schedules "A" and "D" was likewise subject to the same control by the People of the State of New York and by Congress of the United States.

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102. The people of the State of New York enacted Chapter 121 of the Laws of 1855, entitled "An Act for the appointment of a commission for the preservation of the harbor of New York from encroachments and to prevent obstruction to the necessary navigation thereof."

103. Under and pursuant to the provisions of this act the Commissioners appointed by the Governor of the State of New York did recommend, submit and present to the legislature, the establishment of such exterior lines, in different parts of the said harbor, opposite and along the waterfronts of the cities of New York and Brooklyn, the County of Kings and County of Richmond, and beyond which no erection or permanent obstruction of any kind should be permitted to be made.

*Answer to Amended Complaint*

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104. The exterior lines so recommended by said Commissioners were ratified and confirmed by the legislature of the State of New York by Chapter 763 of the Laws of 1857, entitled An Act to establish bulkhead and pierhead lines for the port of New York.

105. The bulkhead line recommended by said Commissioners under and pursuant to the provisions of Chapter 121 of the Laws of 1855 and ratified and confirmed by Chapter 763 of the Laws of 1857, was located over and across the premises involved in this action one hundred feet westerly of the westerly line of Twelfth Avenue.

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106. The predecessors in title of plaintiffs were by the provisions of this act prohibited from filling in the premises involved in this action beyond the bulkhead line so established by the Mayor, Aldermen and Commonalty were prohibited from requiring the predecessors in title of the plaintiffs from making and building 39th, 40th, 41st Streets and 13th Avenue exterior to and beyond the bulkhead line so established.

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107. The Mayor, Aldermen and Commonalty of the City of New York were, by Chapter 574 of the Laws of 1871, authorized to adopt a plan for the improvement of the waterfront of the City of New York which was to be the sole plan for such improvement and said act prohibited any improvement of the waterfront except in accordance with such plan subsequent to its adoption by the City authorities.

108. The Mayor, Aldermen and Commonalty of the City of New York, under and pursuant to the provisions of said Chapter 574 of the Laws of 1871, did duly adopt a plan for the improvement of the

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waterfront of the City of New York and thereby established a bulkhead line or line of solid filling across the premises involved in this action along a line 150 feet westerly from the westerly side of Twelfth Avenue.

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109. The Secretary of War of the United States of America did, under and pursuant to authority vested in him by Congress, duly established, in the year 1890, a bulkhead line across the premises involved in this action which said bulkhead line was coincident with the bulkhead line established by the Mayor, Aldermen and Commonalty of the City of New York, under and pursuant to the provisions of Chapter 574 of the Laws of 1871.

110. The bulkhead lines established as set forth in paragraphs 100 and 101 are the existing and present bulkhead lines along the waterfront of the City of New York on the North River and across the premises involved in this action.

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111. At all the times mentioned herein and up to the date of this answer none of the premises covered by the water grants set forth in the complaint have been filled in and improved by the plaintiffs or their predecessors in title beyond about the easterly side of 12th Avenue.

112. After the adoption of the plan for the improvement of the waterfront in the year 1871, and the establishment by the Secretary of War of the bulkhead line as hereinbefore set forth, the predecessors in title of the plaintiffs were and the plaintiffs are prohibited from filling in the premises involved in this action and The Mayor, Aldermen and Commonalty of the City of New York and defendant, The City of New York, the successor

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corporation of the Mayor, Aldermen and Commonalty of the City is prohibited from enforcing the covenants contained in the water grants set forth in the amended complaint relative to making and building 39th, 40th and 41st Streets and 13th Avenue exterior to the bulkhead lines so established.

113. All of said lines were established more than twenty years prior to the commencement of this action.

AS AND FOR A THIRD SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY OF THE ALLEGED CAUSES OF ACTION SET FORTH IN THE AMENDED COMPLAINT DEFENDANT, WEEHAWKEN STOCK YARD COMPANY, ALLEGES:

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114. The alleged causes of action set forth in the amended complaint did not accrue within six years prior to the commencement of this action.

115. The alleged causes of action set forth in the amended complaint did not accrue within ten years prior to the commencement of this action.

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116. The alleged causes of action set forth in the amended complaint did not accrue within twenty years prior to the commencement of this action.

AS AND FOR A FOURTH SEPARATE AND DISTINCT DEFENSE TO THE FIRST, SECOND AND THIRD CAUSES OF ACTION SET FORTH IN THE AMENDED COMPLAINT, DEFENDANT, WEEHAWKEN STOCK YARD COMPANY, ALLEGES:

117. In or about the year 1850 a pier was built entirely within the lines of 39th Street from about the easterly line of 12th Avenue extending into the North or Hudson River about 300 feet.

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118. In or about the year 1890 an action was brought by the Mayor, Aldermen and Commonalty of the City of New York against The New York Central & Hudson River Railroad Company, West Shore and Ontario Terminal Company and John A. Davis, to recover possession of the land and land under water within the lines of 39th Street specifically described in the amended complaint in said action, together with the bulkhead, pier and parts of piers with the buildings and structures thereon erected.

317

119. Such proceedings were had in said action that on the 18th day of March, 1891, a judgment was entered in favor of the Mayor, Aldermen and Commonalty of the City of New York for the possession of said premises.

120. On appeal, the judgment so entered was affirmed by an order of the General Term entered on the 12th day of May, 1893, and on appeal to the Court of Appeals, the judgment so entered was affirmed on the 25th day of October, 1895.

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121. The Mayor, Aldermen and Commonalty of the City of New York and The City of New York, the successor corporation, have since such date occupied, possessed and maintained said pier.

122. Prior to 3rd day of January, 1900, The City of New York widened said pier to the width of 39th Street and extended the same out to the pier head line approved by the Secretary of War in the year 1897 a distance of over 650 feet and has ever since occupied, possessed and maintained said pier as widened and extended since such date.

123. In or about the year 1852, The Mayor, Aldermen and Commonalty of the City of New York constructed a pier entirely within the lines of 40th



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Street from about the easterly side of 12th Avenue extending into the North or Hudson River about 450 feet and said pier has been occupied, possessed and maintained by The Mayor, Aldermen and Commonalty of the City of New York and The City of New York since such year.

124. Prior to the 15th of March, 1887, The Mayor, Aldermen and Commonalty of the City of New York widened said pier to the entire width of 40th Street and extended the same into the Hudson or North River over 300 feet and said pier so widened and extended has been possessed, occupied and maintained by the Mayor, Aldermen and Commonalty of the City of New York and The City of New York since such date.

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125. By virtue of the permit referred to in paragraph C1 of the amended complaint, and by virtue of similar permits defendant, Weehawken Stock Yard Company, has now and for some years past has had the use and occupation of a portion of the said pier in West Fortieth Street and North River, together with the rights of wharfage and access to said pier and the slip and basin alongside of said pier.

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AS AND FOR A FIFTH SEPARATE AND DISTINCT DEFENSE TO EACH AND EVERY OF THE ALLEGED CAUSES OF ACTION SET FORTH IN THE AMENDED COMPLAINT AND BY WAY OF COUNTERCLAIM, THIS DEFENDANT ALLEGES:

126. The Mayor, Aldermen and Commonalty of the City of New York, prior to the 1st day of January, 1898, was a municipal corporation existing under and by virtue of its ancient charters and the statutes of the State of New York and by virtue of

*Answer to Amended Complaint*

its ancient charters, letters patent and statutes, was, prior to the year 1850, seized and possessed, subject to the control of the Legislature of the State of New York and to the control of Congress of the United States of America, together with other lands under water, of the lands under water of the North River between the high water mark of said river and 13th Avenue and between 39th and 41st Streets.

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127. The Mayor, Aldermen and Commonalty of the City of New York in the year 1852 duly issued to Robert Latou, a water grant covering lands under water between 40th and 41st Streets from high water mark of the Hudson River out to 13th Avenue established by chapter 182 of the Laws of 1837, a copy whereof is attached to the amended complaint herein as Schedule D and is made part of this answer as if herein set forth in full and in the year 1853 duly issued to Charles E. Appleby a water grant covering lands under water between 39th and 40th Streets from high water mark of the Hudson River out to 13th Avenue established by Chapter 182 of the Laws of 1837, a copy whereof is attached to the complaint herein as Schedule A and is made part of this answer as if herein set forth in full.

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128. In said water grants said Robert Latou and Charles E. Appleby for themselves, their heirs and assigns covenanted to pay and satisfy all taxes and assessments lawfully imposed or levied upon the granted premises.

129. The title to the premises covered by the water grant to Robert Latou became by mesne conveyance vested in Charles E. Appleby and the title thus acquired and the title to the premises covered by the water grant to Charles E. Appleby became vested by devise in the plaintiffs herein.

*Answer to Amended Complaint*

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130. The City of New York is a municipal corporation existing under and by virtue of the statutes of the State of New York and is the successor corporation of The Mayor, Aldermen and Commonalty of the City of New York.

131. The Mayor, Aldermen and Commonalty of the City of New York and The City of New York have duly levied taxes and assessments upon said premises.

132. Neither the plaintiffs nor their predecessor in title have paid or satisfied the taxes and assessments duly levied upon so much of the premises covered by the water grant to Charles E. Appleby as lie westerly of 12th Avenue since the year 1871. 326

133. Neither the plaintiffs nor their predecessor in title have paid or satisfied the taxes and assessments duly levied upon so much of the premises covered by the water grant to Robert Latou as lie westerly of 12th Avenue since the year 1882.

WHEREFORE the defendant, Weehawken Stock Yard Company, demands judgment 327

1st. That the complaint herein be dismissed, with costs;

2nd. That the water grants herein issued to Robert Latou and Charles E. Appleby be declared null and void and be vacated and set aside.

3rd. That defendant, The City of New York, is seized of said premises and entitled to the possession thereof, and that defendant, Weehawken Stock Yard Company, by virtue of the permits referred to in paragraph 125 of this answer is entitled to the use and occupancy of the premises and other privi-

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*Answer to Amended Complaint*

leges granted by said permits referred to in said paragraph.

STETSON, JENNINGS & RUSSELL,  
Attorneys for Defendant,  
Weehawken Stock Yard Company,  
15 Broad Street,  
Borough of Manhattan,  
New York City.

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STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

DAVID BOSMAN, being duly sworn, deposes and says that he is Vice-President and Secretary of the Weehawken Stock Yard Company, one of the defendants named in the foregoing answer to the amended complaint; that he has read said answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

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DAVID BOSMAN.

Sworn to before me this 16th }  
day of July, 1915. }

WM. H. BRUDER,  
Notary Public,  
Bronx County, No. 35.

Certificate filed in New York County, No. 45.

**Proposed Findings of Fact and Conclusions of Law of the Plaintiffs.** 331

NEW YORK SUPREME COURT,  
NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

Plaintiffs,

*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

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The plaintiffs present the following statement of facts which they deem established by the evidence and the rules of law they desire the Court to make:

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I. The City of New York is a domestic municipal corporation, and is the successor of the Mayor, Aldermen and Commonalty of the City of New York. The Central Railroad Company of New Jersey, New York Horse Manure Transportation Company and the Weehawken Stock Yard Company are foreign corporations, organized and existing under the Laws of the State of New Jersey. The New York Butchers' Dressed Meat Company, Burns Bros. and New York Stock Yards Company are domestic corporations.

Found.—F. K. P.

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*Plaintiffs' Proposed Findings*

II. Under due authority, George B. Smith, City Surveyor, prepared a map, dated March 10th, 1837, showing the projected exterior line of the City of New York extending along the Hudson River from Hammond Street to One Hundred and Thirty-fifth Street. Said map was approved by the Mayor, Aldermen and Commonalty of the City of New York on March 28, 1837, and duly filed in the office of the Street Commissioner of the City of New York, and thereafter adopted by the Legislature of the State of New York on April 12th, 1837, by Chapter 182 of the Laws of 1837.

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Found.—F. K. P.

III. Chapter 182 of the Laws of 1837 entitled "AN ACT to establish a permanent exterior street or avenue in the City of New York, along the easterly shore of the North or Hudson's river, and for other purposes" passed April 12, 1837, enacted as follows:

Found.—F. K. P.

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"Sec. 1. The Thirteenth Avenue, as laid out on a map made by George B. Smith, city surveyor, bearing date March tenth, eighteen hundred and thirty-seven, and approved by the mayor, aldermen and commonalty of the city of New York, by a resolution passed in common council on the twenty-eighth day of March, eighteen hundred and thirty-seven (which map is filed in the office of the street commissioner of the City of New York), shall be the permanent exterior street or avenue in the said city along the easterly shore of the North or Hudson's river between the southerly line of Hammond street and the northerly line of One Hundred and Thirty-fifth Street.

*Plaintiffs' Proposed Findings*

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"Sec. 2. The several streets of the said city as laid out on the map or plan made by the commissioners appointed by the act, entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes,' passed April 3d, 1807, or as subsequently established by law, southerly of and including One Hundred and Thirty-fifth Street, shall be continued and extended westerly along the present lines thereof, from their present terminations, on the said map or plan, respectively, to the said Thirteenth Avenue. Also, the Eleventh Avenue shall be continued and extended, on the said map or plan, along the present line thereof from its present southerly termination at or near Thirty-third Street to Nineteenth Street; and the Twelfth Avenue shall be continued and extended on the said map or plan, along the present line thereof, from Thirty-sixth Street to One Hundred and Thirty-fifth Street.

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"Sec. 3. The mayor, aldermen and commonalty of the city of New York shall be, and they are hereby, vested with all the right and title of the people of this State to the lands covered with water along the easterly shore of the North or Hudson's river, between Hammond Street and One Hundred and Thirty-fifth Street, and extending from the westerly side of the lands under water, heretofore granted to the said mayor, aldermen and commonalty of the city of New York, by letters patent, in pursuance of the act, entitled 'An act relative to improvements in the city of New York,' passed February 25th, 1826, to the westerly side of the said Thirteenth Avenue. And the

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*Plaintiffs' Proposed Findings*

said letters patent shall be construed so as to grant to the said mayor, aldermen and commonalty of the city of New York, and their successors forever, the said lands under water easterly of the westerly line of the said Thirteenth Avenue."

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Sec. 4. The proprietors of the upland shall have the pre-emptive right in all grants made by the said mayor, aldermen and commonalty of the city of New York of any lands under water granted to them by this act.

IV. On or about August 1st, 1853, the Mayor, Aldermen and Commonalty of the City of New York, by an indenture in writing duly executed, acknowledged and delivered, duly bargained, granted, sold and conveyed to Charles E. Appleby, plaintiffs' predecessor in title, for an expressed consideration of \$6,369.37 and certain covenants hereinafter noted.

Found.—F. K. P.

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"ALL that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded, described and containing as follows; that is to say:

BEGINNING at a point of intersection of the line of original high-water mark with the line of the centre of Thirty-ninth Street and running thence westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the westerly line or side of Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said city, as established by law,



*Plaintiff Proposed Findings*

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thence northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed dated New York, June 1853, made by John I. Serrell, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture. The premises conveyed being colored pink on said map, be the said dimensions more or less.

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SAVING AND RESERVING from and out of the hereby granted premises so much thereof as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, for the uses and purposes of Public Streets, Avenues and highways as hereinafter mentioned.

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TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining.

AND also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, of, in and to all the said premises and every part and parcel thereof, with the appurtenances.

*Plaintiffs' Proposed Findings*

TO HAVE AND TO HOLD the said premises hereby granted to the said Charles E. Appleby, his heirs and assigns to his own proper use, benefit and behoof forever."

V. The map dated June 18, 1853, and made by John I. Serrell, City Surveyor, and annexed to said deed, shows 39th Street and 40th Street, 12th and 13th Avenues as laid out thereon.

Found.—F. K. P.

347 VI. The said deed to Charles E. Appleby contained the following covenants and agreements:

Covered by other Finding.—F. K. P.

A. Covenants by the grantee.

That said Charles E. Appleby, the said party of the second part, for himself, his heirs and assigns doth covenant and agree to and with the Mayor, Aldermen and Commonalty of the City of New York, the parties of the first part, their successors and assigns,

1. "that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted four good and sufficient Bulk-heads, Wharves, Streets and Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Thirty-ninth and Fortieth Streets as fall within the limits of the premises above described, and are reserved as

*Plaintiffs' Proposed Findings*

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aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof."

2. "AND also that the said party of the second part, his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Thirtieth and Fortieth Streets, which the said party of the second part hath covenanted and agreed to make, erect and build as aforesaid, and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part, and their successors shall from time to time enact and pass or make relative thereto."

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3. "AND also that the said streets and avenues shall forever thereafter continue to be and remain public streets and avenues and highways for the free and common use and passage of the Inhabitants of said City, and others passing and repassing by, through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now use or lawfully ought to be" and

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4. "in case default shall be made by said party of the second part, his heirs and assigns, in building, erecting, making or finishing the said bulkheads, wharves, streets and avenues by him covenanted herein to be built, erected,

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*Plaintiffs' Proposed Findings*

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made and finished, and in filling in the same or any part thereof, or in complying with any ordinance, resolution or order of the said parties of the first part, or their successors when required then, and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make, or finish the bulk-heads, wharves, streets and avenues as aforesaid, and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns, and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof together with the interest thereon and all costs and charges of the proceedings relative to the same, or to sell and dispose of the said hereby granted premises, or any part thereof, at public auction for the most that can be had for the same, and in cases of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns, the amount of such deficiency, or to adopt and pursue any legal right or remedy that the said parties of the first part, or their successors now possess, and enjoy under and by virtue of any act of the Legislature of the State of New York, or that may hereafter be granted unto the said parties of the first part, or their successors by the Legislature of the State of New York, or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues, and the right receiving the wharfage,

*Plaintiffs' Proposed Findings*

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cranage and profits arising to and from the same, to any other person or persons their heirs, and assigns forever."

5. "AND also that the said party of the second part, his heirs and assigns shall and will pay and satisfy all taxes, assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully so imposed or levied upon the hereby granted premises under and by virtue of any act or acts, of the Congress of the United States of America, or of the Legislature of the State of New York, or by any act, ordinance or resolution of the said parties of the first part, or their successors."

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6. "that the said party of the second part, his heirs and assigns

(a) will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,

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(b) and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose."

\* \* \* \* \*

7. "AND the said party of the second part, covenants and agrees to pay all expenses which

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*Plaintiffs' Proposed Findings*

has been incurred by said parties of the first part for regulating the streets embraced in this grant between the high-water mark, and the permanent exterior line of said city.

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8. "AND the said party of the second part, for himself, his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, and he the said party of the second part his heirs and assigns shall and will in any things well and faithfully comply with and fulfill and perform all and every of the covenants, conditions and agreements, undertakings and provisions herein contained and on his part to be kept, performed and complied with."

## B. Covenant by the City.

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"AND the said parties of the first part, for themselves, their successors and assigns do covenant and agree to and with the said party of the second part, his heirs and assigns that the said party of the second part, his heirs and assigns observing, fulfilling and keeping all and singular the articles, covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents, shall and lawfully may from time to time and at all times hereafter fully have, and enjoy, take and receive and hold to his own proper use, all manner of wharfage, crantage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City, lying on the westerly side of the hereby granted premises fronting on

*Plaintiffs' Proposed Findings*

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the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever.

"EXCEPTING therefrom such wharfage, cranage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half part of Thirty-ninth Street and the southerly half part of Fortieth Street, which shall be and are hereby reserved for the said parties of the first part, their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever."

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## C. Agreements By and Between the Parties.

"AND it is hereby further agreed by and between the parties to these presents, and the true intent and meaning thereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizin, of said parties of the first part or their successors or to operate further than to pass the estate, right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York."

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"AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition, that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof lawfully entitled to take and receive this grant as the

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*Plaintiffs' Proposed Findings*

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purchaser of the right thereto, from the proprietors of the lands and premises on the easterly side of the premises hereby granted, and adjoining the same; or if the said party of the second part, his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part, and behalf, to be observed, performed, fulfilled and kept, then, and in every such case, these presents and every article, clause or thing herein contained shall be and become absolutely null and void."

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"AND the said parties of the first part, and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted and shall thereafter be seized of the same with the appurtenances free, clear and discharged of, and from any claim, right or pretence of claim or right of the said party of the second part, his heirs and assigns anything herein contained to the contrary notwithstanding."

## VII. The Covenant by the grantee,

That he, his heirs and assigns, "will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,"

relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

This seems to be finding of law. Found.  
62 N. Y., 592.—F. K. P.



*Plaintiffs' Proposed Findings*

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VIII. The covenant by the grantee that he his heirs and assigns

"will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose"

refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues. 368

This is a finding of law. Found.—F.  
K. P.

IX. The said deed to Appleby contained no covenant or agreement to fill in or improve the intervening spaces between the streets and avenues and no covenant not to fill in or improve the same.

Covered by finding elsewhere.—F. K. P.

X. The said deed to Appleby contains no covenant not to build wharves and piers in or upon the said granted premises between the streets and avenues. 369

Covered by finding elsewhere.—F. K. P.

XI. The only exception or reservation by said City under said deed to Appleby of wharfage, cranage, advantages and emoluments, is at the westerly end of the bulkhead in front of the entire width of the northerly half part of 39th Street and the southerly half part of 40th Street shown on the map annexed to the deed by the figures 30.1¼ feet on the bulkhead line. No right to take or receive wharfage at any time was reserved or excepted to the said City at or along the northerly side of 39th

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*Plaintiffs' Proposed Findings*

Street, shown as 363 feet on said map or the southerly side of 40th Street shown as a distance of 379.2 feet.

Covered elsewhere.—F. K. P.

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XII. Said deed to Appleby contained no reservation or exception of any right to the said City to construct piers in 39th Street or 40th Street as shown on said map annexed to the deed and there is no reservation or exception of any easement or right in the said City to approach said streets by water, or to use plaintiffs' granted premises between the streets and avenues for the purpose of mooring and docking boats alongside of any piers in said streets, or to otherwise appropriate plaintiffs' said premises for slips and basins under and pursuant to any plan for the improvement of the water front.

Covered by finding setting forth grant.—F. K. P.

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XIII. 39th Street and 40th Street, shown on the map annexed to the said deed to Appleby, were duly established at the time of said deed and easements of light, air and access vested in said Appleby by reason of the filing of said map and the conveyance of the said premises by reference thereto.

This seems to be a finding of fact. Refused.—F. K. P.

XIV. Said deed to Appleby was duly recorded in the office of the Register of New York County and a duplicate or counterpart thereof filed in the Comptroller's office of said City.

Found.—F. K. P.

XV. At the time when the said deed to Appleby was made, executed and delivered, Chapter 182 of the Laws of 1837 was in full force and effect.

Found.—F. K. P.

*Plaintiffs' Proposed Findings*

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XVI. On or about December 24th, 1852, the Mayor, Aldermen and Commonalty of the City of New York, by an indenture in writing, similar in all material respects to the deed to Charles E. Appleby hereinbefore mentioned, for and in consideration of the sum of \$4,937.50 granted, bargained, sold and conveyed to Robert Latou all of the premises between West 40th Street and West 41st Street, and between original high water mark and the westerly side of Thirteenth Avenue, saving and reserving to the said City so much thereof as by the map annexed form parts or portions of Twelfth and Thirteenth Avenues, 40th and 41st Streets, for the use and purpose of public streets, avenues and highways as therein mentioned, together with certain wharfage and cranage in substantially the same language as used in the said deed to Charles E. Appleby.

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Covered by finding elsewhere.—F. K. P.

XVII. As the language in the said deed to Robert Latou is in all material respects the same as that in the said deed to said Charles E. Appleby, the preceding findings of fact in relation to the Appleby deed are hereby found in respect to the said Latou deed.

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Found.—F. K. P.

XVIII. Said deed to Latou was duly recorded in the Register's office of New York County and a duplicate or counterpart thereof filed in the Comptroller's office of said City.

Found.—F. K. P.

XIX. On or about January 12th, 1853, said Robert Latou sold and conveyed to Charles E. Appleby, all of the premises hereinbefore men-

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*Plaintiffs' Proposed Findings*

tioned in the XVI finding of fact, by deed duly recorded in the Register's office of New York County.

Found.—F. K. P.

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XX. That said Charles E. Appleby continued the sole owner of both the aforesaid premises until December 15th, 1913, when he died, leaving him surviving his two sons, Edgar S. Appleby and John S. Appleby, the plaintiffs herein, to whom he devised and bequeathed all of his property, including said premises, by a Last Will and Testament duly probated and filed.

Found.—F. K. P.

XXa. Neither the plaintiffs nor their predecessors in title have ever parted with any right or title in and to said premises or to any right, privilege, easement or emoluments therein or appurtenant thereto.

Found.—F. K. P.

378

XXI. Said Charles E. Appleby filled in a portion of said premises from high water mark out to a point about 4 feet east of the easterly line of Twelfth Avenue and made the land in the streets to that point.

Found.

XXII. That said Charles E. Appleby and his predecessor or successors in title have never been required to build or erect the streets, wharves or bulkheads over the remaining portion of said premises, and the plaintiffs and their predecessors in title have kept and performed and complied with all of the articles, covenants and agreements contained in said grants.

Found except as to taxes.—F. K. P.

XXIII. The provisions of Chapter 763 of the Laws of 1857 have been repealed except so far as

*Plaintiffs' Proposed Findings*

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they have been incorporated in the subsequent consolidation acts and Charters (Chapter 410 of the Laws of 1882; Chapter 378 of the Laws of 1897 and Chapter 466 of the Laws of 1901) of the City of New York, in so far as it affects the plaintiffs' rights and title.

This law found.—F. K. P.

XXIV. The Harbor Commissioner's map of 1857 shows a pierhead line 500 feet west of Twelfth Avenue, which is west of the plaintiffs' premises, and the pierhead line has since that time been moved 300 feet further west of plaintiffs' premises.

380

Found.—F. K. P.

XXV. On April 5th, 1870, the Legislature passed an act (Chapter 137 of the Laws of 1870) to reorganize the local government of the City of New York, and the Department of Docks was thereby created.

Found.—F. K. P.

XXVI. Chapter 574 of the Laws of 1871, passed by the Legislature April 18th, 1871, amended Chapter 137 of the Laws of 1870, and provided in Section 99 thereof.

381

This question of law. Statutes speak for themselves.—F. K. P.

By Par. 2, vested in the Department of Docks exclusive charge and control of wharves, piers, slips, basins, docks, etc., which are now owned or possessed by the City, and also vested said Department with exclusive government and regulation of all wharves, piers, bulkheads and structures thereon and water adjacent thereto and all basins, slips and docks with the land under water not owned by said City.

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By Par. 3 directed the said Department of Docks to determine upon a plan for the water front, submits same to the Commissioners of the Sinking Fund and when adopted by said Commissioners, to be the sole plan according to which any wharf, pier, bulkhead, basins, dock or slip, etc., shall thereafter be laid out or constructed, and all other provisions of law regulating solid filling and pier or bulkhead lines in said waters are deemed to be repealed upon the filing of said plan, if said plan be inconsistent with such provisions of law.

383

By Par. 4, said act authorized the Department of Docks to acquire in the name and for the benefit of said City any and all wharf property in said City to which said City then has no right or title, and any rights, terms, easements and privileges pertaining to any wharf property in said City and not owned by said corporation. And said board is authorized to and may acquire the said wharf property by purchase or by proceedings as therein set forth.

384

By Par. 5, the Department of Docks was directed to lay out, establish and construct wharves, piers, bulkheads, basins, docks or slips, according to such plan in or upon the property owned by said City, "without interfering with the property or rights of any other person," except so far as may be necessary to insure the safety and stability of the wharves, piers, bulkheads, basins or slips so to be constructed.

XXVII. The plan contemplated in the act of 1871 was determined upon by the Department of Docks and adopted by the Commissioners of the Sinking Fund on April 27th, 1871.

Found.—F. K. P.

*Plaintiffs' Proposed Findings*

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XXVIII. The plan of 1871 contained a proposed bulkhead line 150 feet westerly from and parallel with Twelfth Avenue and a pierhead line 500 feet westerly from and parallel with the proposed bulkhead line. The pierhead line was approximately 250 feet west of the plaintiffs' premises hereinbefore mentioned.

Found.—F. K. P.

XXIX. Said plan was subsequently amended by fixing the pierhead line 200 feet further westerly, that is, 700 feet west of the proposed bulkhead line and 450 feet west of the plaintiffs' premises.

386

Found.—F. K. P.

XXX. Said plan of 1871 provided that that portion of plaintiffs' premises between Twelfth Avenue and a line 150 feet westerly therefrom and parallel therewith should be acquired by said City as a part of the marginal wharf, way or place, and that the remaining portion of plaintiffs' premises should be acquired for bulkheads and docks, slips or basins appurtenant to the piers, which piers were to be erected in 39th Street, 40th Street and 41st Street and to extend westerly to the pierhead line.

387

Found.—F. K. P.

XXXI. On June 11, 1891, the Department of Docks of said City adopted certain preambles and resolutions to acquire title to plaintiffs' said premises for the purpose of carrying out the improvement of the water front as provided for by the plan of 1871.

Found.—F. K. P.

XXXII. On or about December 18th, 1894, the Mayor, Aldermen and Commonalty of the City of New York, acting by and through the Department

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*Plaintiffs' Proposed Findings*

of Docks, instituted a proceeding to acquire all the right and title to and possession of the wharf property, rights, terms, easements, emoluments and privileges of and to the land under water and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River between 39th and 41st Streets and between Twelfth and Thirteenth Avenues, pursuant to the said plan.

Found.—F. K. P.

389

XXXIII. In the said petition for the appointment of Commissioners of Estimate, it is alleged among other things

“that said Department of Docks, acting for and on behalf of said City, has deemed and still deem it proper and it has heretofore seemed and still seems necessary for the improvement of the water front of said City to acquire title to all of the aforesaid premises, rights, etc., describing same by metes and bounds, and being the same premises which are involved in this action. That all of said premises, rights, etc., were during the negotiations for their purchase, and still are, owned by Charles E. Appleby.

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“That the said City has not now and at the time stated therein had not any right or title in or to or pertaining to any of the wharfage property therein before described, and

“That the interests of the public and the demands of commerce for that section of the City cover the acquisition of said property.”

Found.—F. K. P.

XXXIV. By an order of the Supreme Court dated December 31st, 1894, the Commissioners of



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Estimate in said proceeding were duly appointed, duly filed their oaths, and the said Charles E. Appleby filed his claim with said Commissioners, but no report by the Commissioners has been made and no awards were ever paid, and on July 30th, 1914, the Board of Estimate and Apportionment of the City of New York adopted a resolution attempting to discontinue said proceeding under Section 1000 of the Greater New York Charter.

Found.—F. K. P.

392

XXXV. On or about January 3d, 1900, the Department of Docks of the City of New York constructed, according to said plan, a pier in 39th Street 150 feet west of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue, and on or about July 24th, 1902, the City widened the approach to said pier to the same width of the pier; and on or about September 27th, 1907, authorized the construction and maintenance of a dumping board with necessary runway, scale house, tool house and shelter for workmen on said pier. Said dumping board encroaches (upon the plaintiff's premises) [beyond the lines of the proposed street] for a distance of about 40 feet 3 inches east of Thirteenth Avenue by 13 feet 3½ inches north of the northerly line of 39th Street cattle runway.

393

Note.—Words in ( ) stricken out, and words in [ ] inserted in place thereof by Court.

Found.—F. K. P.

XXXVI. On or about December 29th, 1911, the Dock Department and the City of New York constructed a pier in 40th Street, beginning about 4 feet east of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue and on or about June 21st, 1912, constructed an iron or steel

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*Plaintiffs' Proposed Findings*

shed over that portion of the pier beginning at a point about 150 feet west of Twelfth Avenue, and extending to and beyond Thirteenth Avenue.

Found.—F. K. P.

395

XXXVII. On or about November 26th, 1904, the Dock Department of the City of New York constructed or caused to be constructed a pier in 41st Street from a point 4 feet east of Twelfth Avenue and extending to and beyond Thirteenth Avenue, and on or about August 26th, 1906, constructed or caused to be constructed an iron or steel shed upon said pier beginning at a point about 150 feet west of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue. The fence across 41st Street about 4 feet east of the easterly line of Twelfth Avenue was constructed on or about September 10th, 1912.

Found.—F. K. P.

396

XXXVIII. Said sheds, fences, gates, dumping board, etc., deprive plaintiffs of access to or upon said piers or streets and also deprive plaintiffs of their easements in said streets.

Refused.—F. K. P.

XXXIX. Said piers were constructed without the consent and against the will of the plaintiffs or their predecessors in title and without compensation to them.

Found.—F. K. P.

XL. After the construction of said piers, the plaintiffs' premises have been frequently excavated and dredged by the defendant, the City of New York, its servants and agents, (for the purpose of obtaining the proper depth of, and making plaintiffs' premises more available for, slips and basins alongside of said piers. Prior to said dredging, the

*Plaintiffs' Proposed Findings*

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plaintiffs' premises were covered by shallow water from 4 to 8 feet in depth. After said dredging, the depth of the said water was increased to 15 to 20 feet).

Note.—Words in ( ) stricken out by Court.

Found.—F. K. P.

If part erased important, counsel may point out testimony.—F. K. P.

XLI. That [as a consequence of] the use of the sides of said piers for boats (necessarily requires the use of) [they navigate in the waters over] plaintiffs' said premises (adjoining for slips and basins). The boats, (floats) and water craft in using the sides of said piers, have (necessarily) remained (and moored over and upon) [in the waters over] the plaintiffs' premises, and the defendants intend to continue these acts in the future.

398

Note.—Words in ( ) stricken out, and words in [ ] inserted by the Court.

Found.—F. K. P.

399

XLII. The City of New York, acting by the Department of Docks and Ferries, has leased and issued permits to the defendants herein and to others, of all the wharf property situated on the North River, Manhattan, between 39th Street and 41st Street and between Twelfth and Thirteenth Avenues, including all of the plaintiffs' premises hereinbefore described.

Refused.—F. K. P.

XLIII. The leases of said wharf property uniformly refer to the sides of the pier or piers and the half slip or basin adjoining.

Refused.—F. K. P.

400

*Plaintiffs' Proposed Findings*

XLIV. The north side of the 39th Street pier with the half slip or basin adjoining for a distance of 300 feet at the inner end of said pier is leased to the defendant, New York Butchers Dressed Meat Company, from January 1st, 1915, to April 1st, 1924, of the total of \$3,712.50 per annum.

Refused.—F. K. P.

401

XLV. Similar leases or permits in similar language were and are issued and made to the other defendants in this action, some of which expire in the year 1924 and have renewal privileges for ten years each. Substantially all of plaintiffs' premises are covered by the leases and permits.

Refused.—F. K. P.

XLVI. The said leases and permits and the use of said piers necessarily impose an easement of access to said piers over the plaintiffs' said premises.

Refused.—F. K. P.

402

XLVII. That the City of New York has received a large amount of rent, incomes and profits from the said leases and permits.

Found.—F. K. P.

XLVIII. That all of the acts of the defendants hereinbefore referred to have been without the consent of the plaintiffs or their predecessors in title and against their will and without compensation to them.

Found.—F. K. P.

XLIX. That the use of said premises by the defendants is exclusive and prevents the plaintiffs from improving or making any substantial or material use of their said premises.

Refused.—F. K. P.

*Plaintiffs' Proposed Findings*

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L. That the State and Federal authorities have from time to time proposed or fixed or established bulkhead and pierhead lines in and about the plaintiffs' premises hereinbefore described and that the pierhead line is now, and at all times herein mentioned was, west of the premises between the streets and avenues hereinbefore described.

Found.—F. K. P.

LI. That the plaintiffs duly filed their claim with the Comptroller of the City of New York prior to the commencement of this action. 404

Found.—F. K. P.

## CONCLUSIONS OF LAW.

1. The State of New York has succeeded to all the rights of both the Crown and Parliament in the navigable waters and soil underneath them and was vested with the *jus privatum* or ownership of the soil, and the *jus publicum* or the dominion and control of the navigable waters.

Found.—F. K. P.

405

2. The Legislature of the State of New York, subject to the restriction imposed by the Federal Constitution, or the Constitution of this State, has the absolute and uncontrollable power to grant the navigable waters in this State, and the land underneath thereof.

Found.—F. K. P.

3. The Legislature of this State has made such grants as hereinafter set forth and they are irrevocable and inviolable.

Refused.—F. K. P.

4. Chapter 182 of the Laws of 1837, vested in the Mayor, Aldermen and Commonalty of the City

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*Plaintiffs' Proposed Findings*

of New York, the entire and absolute right and title of the State to the land under water, between the streets and avenues and also gave said City power and authority to convey the absolute right and title of said premises to the owners of the adjacent upland.

Refused.—F. K. P.

407

5. Chapter 182 of the Laws of 1837, vested the *jus privatum*, as well as the *jus publicum* in the said Mayor, Aldermen and Commonalty of the City of New York.

Refused.—F. K. P.

408

6. By the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Charles E. Appleby and Robert Latou, set forth in the amended complaint, the grantees and their assigns, acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds, with the right to fill in and improve the same at their pleasure [subject to the *jus publicum* and the Federal Government's power to control].

Found.—Subject to *jus publicum* and the Federal Governments power to control.  
—F. K. P.

7. The grantees, in said deed were vested with all the beneficial use and enjoyment of said premises and can do any act in respect thereto, or make any use thereof which the State could do or make, if the State had not made and authorized the grants hereinbefore mentioned.

Refused.—F. K. P.

8. Subject to the proper regulations of the [state or] Federal authorities, the plaintiffs herein could

*Plaintiffs' Proposed Findings*

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fill in said premises or improve the same with wharves and piers.

Note.—Words in [ ] inserted by Court.

Found.—F. K. P.

9. The right to fill in or improve said premises as aforesaid, is a vested property right which can not be taken from the plaintiffs, without compensation [except by the paramount right of the Federal Government or the exercise of the *jus publicum*].

Note.—Words in [ ] inserted by Court.

410

Found.—F. K. P.

10. (a) The deeds hereinbefore mentioned should be construed according to the intent of the parties; (b) and in favor of the grantees.

(a) Found.—F. K. P.

(b) Refused.—F. K. P.

11. The provisions of Chapter 182 of the Laws of 1837 were in full force and effect at the time of the deeds to Appleby and Latou, and said deeds were made and accepted with knowledge of and reliance upon the provisions and effect of said Act.

411

Found.—F. K. P.

12. The rights of the plaintiffs should be determined according to the statutes in force when the deeds to their predecessors in title were made.

Refused.—F. K. P.

13. Easements of light, air and access in the streets and avenues shown on the maps annexed to the deeds to Appleby and Latou, passed upon the delivery of said deeds and are now owned and possessed by the plaintiffs herein [to become effective when plaintiffs' lands are filled in].

Note.—Words in [ ] added by Court.

Found.—F. K. P.

*Plaintiffs' Proposed Findings*

14. The City of New York has no easement of access by boats over the plaintiffs' premises to the piers in 39th, 40th and 41st Streets between Twelfth and Thirteenth Avenues, and it has no right to dock or moor boats over plaintiffs' said premises, or to use said premises for slips or basins, appurtenant to said piers [but until filled in the waters over plaintiffs' land are navigable waters subject to public use as such].

413 Note.—Words in [] added by Court.

Found.—F. K. P.

15. The City of New York has no right to maintain sheds, dumping boards, fences, or any other structures upon the piers in 39th, 40th and 41st Streets, between Twelfth and Thirteenth Avenues, or to use said piers for wharf purposes, as such uses are repugnant to the provisions of the said deeds to Appleby and Latou, and impair and destroy the rights granted by and acquired under said deeds.

414 Refused.—F. K. P.

16. The City of New York has no right to collect wharfage from the sides of the piers, to wit, the northerly side of 39th Street, north and south sides of 40th Street and the south side of 41st Street, in the streets between Twelfth and Thirteenth Avenues.

Refused.—F. K. P.

17. Chapter 763 of the Laws of 1857, and the Harbor Commissioner's map of 1857, are not effective as to plaintiffs. Said act and map do not affect the premises at the present time and have no bearing upon the plaintiffs' rights or title herein.

Found.—F. K. P.



*Plaintiffs' Proposed Findings*

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18. Under the Dock Department plan of 1871, slips and basins are provided as a part of the wharf property of the City of New York, and said slips and basins are as necessary to the carrying out of said plan as the piers themselves.

**Finding of fact upon evidence.—F. K. P.**

19. In authorizing the City of New York to acquire title to, and possession of the water front, Chapter 574 of the Laws of 1871 also required the City to make compensation for the plaintiffs' land under water whenever it became necessary to use same for piers, slips or basins, and forbid the City to interfere with said property until compensation was made fairly and in the ordinary manner.

416

The statute should be set forth in words  
if it is necessary to find it at all.—  
**F. K. P.**

20. The Acts of Congress and the designation by the Secretary of War, of bulkhead and pierhead lines did not vest in the City of New York any right or title to the plaintiffs' premises and did not confer upon said city any easements or rights to use plaintiffs' premises for slips and basins, or for access to the piers in the streets.

417

**Found.—F. K. P.**

21. The Acts of, and structures maintained by the City as alleged in the amended complaint, violate the rights and title acquired and possessed by the plaintiffs and in a sense, impair and destroy the same.

**Refused as immaterial.** The questions are to be determined on the evidence, not the complaint.—**F. K. P.**

22. The defendants should be enjoined and restrained from exercising and claiming any ease-

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*Plaintiffs' Proposed Findings*

ment over or rights in the plaintiffs' said premises and from docking and mooring boats thereupon.

Refused, except as stated in opinion filed.

—F. K. P.

419

23. The defendants should be restrained and enjoined from maintaining the sheds, fences, dumping boards and other structures on the piers in 39th, 40th and 41st Streets between Twelfth and Thirteenth Avenues, and should be compelled to take down and remove the fence constructed across 41st Street at or near the easterly line of Thirteenth Avenue.

Refused, except as stated in opinion filed.

—F. K. P.

420

24. Plaintiffs are entitled to a judgment enjoining and restraining the defendants aforesaid, but said judgment shall not become operative until ninety days after the service of a copy, and then shall not be operative if the defendant, The City of New York in the meantime proceeds with the condemnation proceeding to acquire plaintiffs' said property right, terms, easements, etc., as specified in the petition and order in the said condemnation proceeding hereinbefore referred to.

Refused, except as stated in opinion filed.

—F. K. P.

25. The plaintiffs should have the costs of this action.

Found.

26. Before the making and filing of the decision herein and the entry of judgment thereupon, the parties may present evidence as to the damages claimed to have been sustained by the plaintiffs and their predecessor, Charles E. Appleby, by rea-

*Plaintiffs' Proposed Findings*

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son of the trespass upon their said premises and rights, and for that purpose.

Found.—F. K. P.

27. Either party to this action may move at the foot of the judgment for further direction as to the enforcement of the same.

Found.—F. K. P.

28. The form of decision and judgment to be entered herein shall be settled on notice of not less than four days to the opposite party.

422

Found.—F. K. P.

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**Plaintiffs' Additional Proposed Findings of Fact and Conclusions of Law.**

SUPREME COURT,

NEW YORK COUNTY.

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<p>EDGAR S. APPLEBY and another, Plaintiffs,</p>	}
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*against*

<p>THE CITY OF NEW YORK, and others, Defendants.</p>	}
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Plaintiffs present the following additional statement of facts which they deem established by the evidence and the rules of law they desire the court to make.

**FINDINGS OF FACT.**

I. Plaintiffs' said premises along the bulkhead line have been dredged from a depth of 3 feet to a depth of 20 feet below mean low water.

Found.—F. K. P.

424 *Plaintiffs' Additional Proposed Findings*

II. As a result of said dredging and deepened water, the plaintiffs will be compelled to build a deeper, larger and stronger bulkhead along the bulkhead line.

Refused.

III. The additional cost of constructing said bulkhead is \$

Refused.

425 IV. The City of New York has, since the construction of said piers in West 39th, West 40th and West 41st Streets, continuously used or caused to be used the plaintiffs' premises for slips and basins for the mooring and docking of boats therein.

Refused, except as found.

V. The value of the use and occupation of plaintiffs' said premises for slips and basins appurtenant to the piers in the streets, for a period of time beginning six years prior to the commencement of this action and ending with the date of trial, is \$

426

Refused.

VI. The tax liens involved in the two actions of the City of New York against Edgar S. Appleby and another, have been satisfied by the payment of \$74,426.01. (where is the evidence, see stipulation, p. 200.)

Found.—F. K. P.

### CONCLUSIONS OF LAW.

1. The City of New York is without right to construct, maintain and use piers in the streets, between Twelfth and Thirteenth Avenues, to wit, the northerly half of 39th Street, 40th Street and the southerly half of 41st Street.

Refused.

*Plaintiffs' Additional Proposed Findings*

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2. The piers and other structures erected within the lines of the streets were constructed by said City, without having first afforded the plaintiffs or their predecessors in title an opportunity to construct the streets. Said City could not nullify the grants or defeat the plaintiffs' rights thereunder by constructing the streets or piers or structures itself.

Refused.

3. The City of New York is without right to excavate, dredge or remove any soil or part of the granted premises between the streets and avenues [east of the bulkhead line].

428

Note.—Words in [] added by Court.

Found.—F. K. P.

4. The City of New York, its agents, servants, contractors, representatives or assigns, or any person or persons whatsoever claiming to have authority from the said City should be enjoined from excavating, dredging or removing the soil of plaintiffs' said premises.

429

Found.

5. The plaintiffs have the right to fill in and make dry land, at their pleasure, and without the consent of the City of New York, of so much of their said premises as lie between the westerly side of Twelfth Avenue and the bulkhead line established by the Secretary of War in 1890, which is 150 feet westerly from and parallel with said Twelfth Avenue.

Refused as not involved in this Action.—F. K. P.

6. The plaintiffs are entitled to improve the remaining portion of their said premises between the said bulkhead line established by the Secretary

430      *Plaintiffs' Additional Proposed Findings*

of War and the easterly side of Thirteenth Avenue, with wharves and piers, slips and basins, at their pleasure and without the consent of the City of New York.

Refused as not involved in this action.—F. K. P.

7. The plaintiffs are entitled to use and occupy their said premises in any manner consistent with the Federal regulations.

Refused; not herein involved.—F. K. P.

431      8. The City of New York should be enjoined and restrained from preventing any use and occupation by the plaintiffs of their said premises as aforesaid.

Refused; not herein involved.—F. K. P.

9. The City of New York, its lessees and licensees should be enjoined and restrained from interfering in any way or manner with the filling in or improvement of said premises as aforesaid by the plaintiffs.

Refused; not herein involved.—F. K. P.

432      10. The City of New York should be enjoined and compelled to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street.

Found—F. K. P.

11. The City of New York should be enjoined and compelled to take down and remove, or caused to be taken down and removed, the fence and gate across West 41st Street, at or near the easterly side of Twelfth Avenue.

Refused.—F. K. P.

12. Said overhanging platform or dumping board and said fence and gate referred to in the two pre-

*Plaintiffs' Additional Proposed Findings*

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ceding conclusions of law, are hereby declared to be unlawful structures.

Refused.—F. K. P.

13. The piers and sheds thereon, the fences, gates and other structures maintained on and about said piers in the northerly half of 39th Street, 40th Street and the southerly half of 41st Street, between Twelfth and Thirteenth Avenues, are hereby declared to be unlawful structures, which as present constructed and used by the City of New York and its lessees or licensees, violate the rights and title acquired and possessed by the plaintiffs, and which, if permitted to continue, would impair and destroy the same.

434

Refused.—F. K. P.

14. The deeds from the Mayor, Aldermen and Commonalty of the City of New York to the grantees, Appleby and Latou, conveyed the *jus publicum* as well as the *jus privatum*.

Immaterial; refused.—F. K. P.

15. The *jus publicum* in the waters covering the plaintiffs' said premises between the streets and avenues has been extinguished.

435

Immaterial; refused.—F. K. P.

16. The said additional cost of constructing the said bulkhead at the present time along the existing bulkhead line is \$ , for which amount plaintiffs are entitled herein against the defendant, The City of New York.

Refused.—F. K. P.

17. The fair and reasonable value of the use and occupation by the defendants of the plaintiffs' premises for the purpose of slips and basins for the period, beginning six years prior to the commencement of this action and ending with the date

436      *Plaintiffs' Additional Proposed Findings*

of trial herein, is §                      for which the plaintiffs are entitled to a judgment herein against the defendants.

Refused.—F. K. P.

18. The action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund, in 1916, does not impair or destroy the property and rights of the plaintiffs.

437                      Immaterial; refused.—F. K. P.

19. Said action of the Dock Commissioner with the approval of the Commissioners of the Sinking Fund does not prohibit the plaintiffs from filling in said premises between the respective lines 50 feet and 150 feet west of Twelfth Avenue.

Immaterial; refused.—F. K. P.

438      20. Chapter 182 of the Laws of 1837 was an integral part of the contract expressed by the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Appleby and Latou, the predecessors in title of plaintiffs.

This and following requests to and including No. 31 are refused as immaterial.—F. K. P.

21. The deeds by said City in the years 1853 and 1854 to Appleby and Latou respectively, for a valuable consideration and certain covenants and agreements therein contained formed valid contracts which could not thereafter be impaired by subsequent legislation, without compensation.

22. If Chapter 574 of the Laws of 1871, as supplemented and amended, be construed as authorizing the Board of Docks with the consent of the Commissioners of the Sinking Fund of the City of New York, to change the bulkhead line established



*Plaintiffs' Additional Proposed Findings*

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by Chapter 182 of the Laws of 1837 and to prohibit, without compensation, solid filling by the plaintiffs or their predecessors in title of the granted premises out to Thirteenth Avenue, then it is invalid, as violating; first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law and taking their property for public use without just compensation.

440

23. Section 819 of the Greater New York Charter and Chapter 372 of the Laws of 1907 did not authorize the carrying into effect of any change of plans for the improvement of the water front between West 38th Street and West 42d Street, North River, Borough of Manhattan, without compensation for plaintiffs' property and rights taken thereby.

441

23a. If said provision and act mentioned in next preceding conclusion of law are construed as authorizing the adoption of a plan for said water front so as to deprive plaintiffs of their property and rights, without compensation, then such provision and act are invalid as violating first, Article 1, Section 10, Part 1 of the Constitution of the United States by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of

442 *Plaintiffs' Additional Proposed Findings*

their property and rights without due process of law and taking their property for public use without just compensation.

443 24. If the adoption of a new plan for the water front by the Commissioner of Docks on May 1, 1916, approved by resolution of the Commissioners of the Sinking Fund of the City of New York on June 1, 1916, be construed as establishing a new bulkhead line 50 feet west of Twelfth Avenue and prohibiting solid filling beyond that point, it is invalid, as violating, first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law and taking their property for public use without just compensation.

444 25. The rules and regulations of the Department of Docks adopted by the Commissioner of Docks pursuant to Section 571 of the Greater New York Charter, are controlling upon plaintiffs only insofar as they maintain a public wharf or exercise the rights of a wharfinger.

25a. If said rules referred to in next preceding conclusion be given effect to limit the time and manner in which the plaintiffs shall fill in and improve their said premises, they are invalid as violating, first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article

*Plaintiffs' Additional Proposed Findings*

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1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law.

26. Neither the State or City can, by any legislation or resolution or any plan adopted pursuant to any legislation or resolution enacted subsequent to the deeds to Appleby and Latou in 1853 and 1854 respectively, deprive the plaintiffs or their predecessors in title of any of their title and rights.

446

27. If the resolutions and plans adopted under any of the legislation or acts hereinbefore referred to be construed as authorizing the City of New York to convert the plaintiffs' premises or any part thereof into slips and basins for the purpose of lengthening the alleged piers in the streets, they are invalid, as violating, first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law and taking their property for public use without just compensation.

447

28. Chapter 763 of the Laws of 1857 does not operate on the deeds to the plaintiffs' predecessors in title and does not deprive them of any of their rights and title under said deeds.

29. If Chapter 763 of the Laws of 1857 should be construed as affecting the deeds to plaintiffs' predecessors in title and limiting their rights to

448      *Plaintiffs' Additional Proposed Findings*

fill in the premises granted under said deeds, such act would be invalid as violating, first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1 of Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process  
449 of law.

30. The Federal Statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises does not deprive plaintiffs of their title and rights in respect to said granted premises, excepting insofar as the right to make solid filling west of the said bulkhead line of 1890, is or may be dependent upon the consent of the Secretary of War thereto.

450      31. If the Federal statute and the action of the Secretary of War be construed as depriving plaintiffs or their predecessors in title of their property and rights, without compensation, they are invalid, as violating the Fifth Amendment of the Constitution of the United States in taking their property without due process of law or for public use without just compensation.

**Proposed Findings of Fact and Conclusions of Law of Defendant The City of New York.** 451

SUPREME COURT OF THE STATE OF  
NEW YORK,

COUNTY OF NEW YORK.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

Plaintiffs,

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*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

453

Before:

Mr. Justice PENDLETON,  
Special Term, Part III.

The issues in the above entitled action having been duly tried before me at a Special Term, Part III, of this Court on the 23rd day of November, 1915, and after hearing the evidence submitted on behalf of the plaintiffs and on behalf of the defendants, and due deliberation having been had thereon, I find as follows:

**FINDINGS OF FACT.**

**I.**

That on or about the 24th day of December, 1852, the Mayor, Aldermen and Commonalty of the City

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*Defendants' Proposed Findings*

of New York granted unto Robert Latou certain lands under the waters of the Hudson River adjacent to the Island of Manhattan, between 39th and 40th Streets, in the words and figures following, to wit:

"THIS INDENTURE made the twenty-fourth day of December, one thousand eight hundred and fifty-two.

455

Between THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK of the first part and ROBERT LATOU of the second part.

456

WITNESSETH that the said parties of the first part for and in consideration of the sum of Four thousand nine hundred and thirty-seven 50/100 dollars lawful money of the United States of America to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged HAVE granted, bargained, sold, aliened, released and conveyed and by these presents Do grant, bargain, sell, alien, release and convey unto the said party of the second part and to his heirs and assigns

ALL THAT certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York and bounded, described and containing as follows, that is to say:

BEGINNING at the point of intersection of the line of original high water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said

*Defendants' Proposed Findings*

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westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law; thence northerly along the westerly line or side of the Thirteenth Avenue two hundred and fifty-eight feet four and a half inches to the line of the centre of Forty-first Street; thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction 458 along said line of original high water mark as it runs to the point or place of beginning

As particularly described, designated and shown on a map hereto annexed dated New York, December, 1852, made by John I. Serrell, City Surveyor, and to which reference may be had said map being considered a part of this indenture the premises conveyed being colored pink on said map be the same dimensions more or less.

SAVING AND RESERVING from and out of the 459 hereby granted premises so much thereof as by said map annexed forms, parts or portions of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned.

TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

AND ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part of in and to the

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*Defendants' Proposed Findings*

said premises and every part and parcel thereof with the appurtenances.

TO HAVE AND TO HOLD the said premises hereby granted to the said Robert Latou, his heirs and assigns to his own proper use, benefit and behoof forever.

461

AND the said party of the second part for himself his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part their successors and assigns that the said party of the second part his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part or their successors at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part or their successors already passed or adopted or that may hereafter be passed or adopted four good and sufficient Bulkheads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets as fall within the limits of the premises first above described and are reserved as aforesaid from out thereof for public streets.

462

AND will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

AND also that the said party of the second part his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses



*Defendants' Proposed Findings*

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uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets which the said party of the second part hath covenanted and agreed to make, erect and build as aforesaid and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part.

AND their successors shall from time to time erect and pass or make relative thereto.

464

AND also that the said streets or avenues shall forever thereafter continue to be and remain public streets or avenues and highways for the free and common use and passage of the inhabitants of said City and all others passing and repassing by, through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now are or lawfully ought to be and in case default shall be made by the said party of the second part, his heirs and assigns in building, erecting, making or finishing the said bulkheads, wharves, streets or avenues by him covenanted herein to be built, erected, made and finished and in filling in the same or any part thereof or in complying with any ordinance, resolution or order of the said parties of the first part or their successors when required, then and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make or finish the bulkhead, wharves, streets or avenues as aforesaid and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and

465

466

*Defendants' Proposed Findings*

charges of the said party of the second part, his heirs and assigns and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof together with the interest thereon.

467

AND all costs and charges of the proceedings relative to the same or to sell and dispose of the whole of the said hereby granted premises or any part thereof at public auction for the most that can be had for the same and in case of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns the amount of such deficiency or to adopt and pursue any legal right or remedy that the said parties of the first part or their successors now possess and enjoy under and by virtue of any act of the Legislature of the State of New York or that may hereafter be granted unto the said parties of the first part or their successors by the Legislature of the State of New York or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues and the right of receiving the wharfage, cranage and profits arising to and from the same to any other person or persons, their heirs and assigns forever.

468

AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes, assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully imposed or levied upon the hereby granted premises under and by virtue of any act or acts of

*Defendants' Proposed Findings*

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the Congress of the United States of America or of the Legislature of the State of New York or by any act, ordinance or resolution of the said parties of the first part or their successors.

AND it is hereby further covenanted and agreed by and between the parties to these presents and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets herein before mentioned or any part thereof or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part or their successors and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part their successor or assigns first had for that purpose.

470

AND the said parties of the first part for themselves, their successors and assigns, do covenant and agree to and with the said party of the second part, his heirs and assigns, that he the said party of the second part, his heirs and assigns, observing, fulfilling and keeping all and singular the articles, covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents shall and lawfully may from time to time and at all times hereafter fully have and enjoy, take and receive and hold to his own proper use all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from

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*Defendants' Proposed Findings*

that part of the said exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River with full power to collect and receive the same for his own proper use and benefit forever.

473

EXCEPTING therefrom such wharfage, crantage, advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half part of Fortieth Street and the southerly half part of Forty-first Street which shall be and are hereby reserved for the said parties of the first part their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

474

AND it is hereby further agreed by and between the parties to these presents and the true intent and meaning hereof is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen of said parties of the first part or their successors or to operate further than to pass the estate right title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several Charters and the various acts of the Legislature of the People of the State of New York.

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof seized of

*Defendants' Proposed Findings*

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a good sure absolute and indefeasible estate of inheritance in fee simple of in and to the lands and premises on the easterly side of the premises hereby granted and adjoining the same or if the said party of the second part his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part.

AND behalf to be observed performed fulfilled and kept then and in every such case these presents and every article, clause or thing herein contained shall be and become absolutely null and void and the said parties of the first part and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted shall thereafter be seized of the same with the appurtenances free clear and discharged of and from any claim right or pretence of claim or right of the said party of the second part his heirs and assigns anything herein contained to the contrary notwithstanding.

476

477

AND the said party of the second part covenants and agrees to pay the assessment and the interest due and to grow due thereon for building the sewer in Forty-second Street assessed upon the premises hereby granted and also to pay all expenses which have been incurred by said parties of the first part for regulating the street embraced in the grant between the High Water Mark and the permanent exterior line of said City.

AND the said party of the second part for himself his heirs and assigns do hereby covenant and agree to and with the said parties of

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*Defendants' Proposed Findings*

the first part their successors and assigns that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants, conditions and agreements, undertakings and provisions herein contained and on his part to be kept performed and complied with.

479

WITNESSETH WHEREOF to one part of these presents remaining with the said parties of the first part the said party of the second part hath set his hand and seal and to the other part thereof remaining with the said party of the second part the said parties of the first part have caused the common seal of the City of New York to be affixed the day and year first above written.

A. C. KINGSLAND, Mayor. BY THE COMMON COUNCIL, D. I. Valentine Clk. C. C. (LS).

CITY AND COUNTY OF NEW YORK, ss.:

480

On this 30 day of December, 1852, before me came David I. Valentine to me personally known who being by me duly sworn deposed and said he is a resident of the City and County of New York that he is the Clerk of the Common Council of said City that the seal affixed to the within grant is the common seal of said City and was so affixed by their authority.

Geo. L. Taylor, Comr. of deeds."

and which said grant, together with the map therein referred to, was recorded in the office of the Register of the City and County of New York on the 3rd day of January, 1853, in Liber 623 of Conveyances, page 170.

Found.—F. K. P.

*Defendants' Proposed Findings*

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## II.

That by sundry mesne conveyances all the right, title and interest which the said Robert Latou acquired under the aforesaid grant set forth in Finding I vested in Charles E. Appleby subject to the conditions of said grant.

Found.—F. K. P.

## III.

That on or about the 1st day of August, 1853, the Mayor, Aldermen and Commonalty of the City of New York granted to Charles E. Appleby certain lands under water in the Hudson River adjacent to the Island of Manhattan, between 40th and 41st Streets, and that said grant to the said Charles E. Appleby in other respects contained substantially the same provisions, conditions, covenants and reservations as those contained in the aforesaid grant to Robert Latou, set forth in Finding 35.

482

Found.—F. K. P.

## IV.

That said Charles E. Appleby died seized of the premises described in the grants referred to in Findings I and III subject to the conditions thereof, on the 15th day of December, 1913, leaving a last will and testament wherein and whereby he devised the premises described in said grants set forth in Findings I to III to his sons Edgar S. Appleby and John S. Appleby, the plaintiffs in this action, and appointed the said sons Executors of his said Last Will and Testament. That said Last Will and Testament was duly admitted to probate in the office of the Surrogate of Monmouth County, New Jersey, on or about the 26th day of December, 1913,

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*Defendants' Proposed Findings*

and an exemplified copy thereof, duly authenticated, filed in the office of the Surrogate of New York County on January 23, 1914; and letters testamentary were duly issued to Edgar S. Appleby and John S. Appleby.

Found.—F. K. P.

## V.

485

That pursuant to the provisions of Chapter 182 of the Laws of 1837, Twelfth and Thirteenth Avenues and 39th and 40th Streets were duly laid out, created, extended and established over the lands under water described in the grants set forth in Findings I and III.

Found.—F. K. P.

## VI.

486

That between the years 1850 and 1857 the Mayor, Aldermen and Commonalty of the City of New York caused or permitted to be erected piers within the lines of 39th and 40th Streets respectively, as said streets were laid but, pursuant to Chapter 182 of the Laws of 1837, referred to in Finding V, and that a pier within the lines of each of said streets has been ever since and continuously maintained.

Found.—F. K. P.

## VII.

That the State of New York, by Chapter 763 of the Laws of 1857, established a bulkhead line through the premises described in the grants set forth in Findings I and III and 100 feet westerly of the westerly line of Twelfth Avenue, as laid out and established by Chapter 182 of the Laws of 1837.

Found.—F. K. P.



*Defendants' Proposed Findings*

487

## VIII.

That Chapter 763 of the Laws of 1857 also prohibited the filling in with earth, stone and other solid material beyond the bulkhead line so established.

Found.—F. K. P.

## IX.

That on the 13th day of April, 1871, the Mayor, Aldermen and Commonalty of the City of New York by virtue of the authority in them vested by Chapter 574 of the Laws of 1871, adopted a plan for the improvement of the waterfront of the City and established a bulkhead line or line of solid filling across the premises described in the grants set forth in Findings I and III, parallel to and 50 feet west of the bulkhead line described in Finding VII. 488

Found.—F. K. P.

## X.

That in the year 1890, the Secretary of War under and in pursuance of the authority vested in him by Act of Congress adopted and established a bulkhead line over and across the lands under water described in the complaint; which said bulkhead line was and is co-incident with the bulkhead line described in Finding IX. 489

Found.—F. K. P.

## XI.

That neither Charles E. Appleby nor the plaintiffs in this action have paid any taxes levied upon the premises described in the grants set forth in Findings I and III since the year 1894.

Found.—F. K. P.

## XII.

That neither Robert Latou, nor any successor in interest of the said Robert Latou, nor the said

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*Defendants' Proposed Findings*

Charles E. Appleby, nor the plaintiffs in this action, nor the Mayor, Aldermen and Commonalty of the City of New York, nor The City of New York, have filled in any of the lands described in the grants referred to in Findings I and III beyond a few feet easterly of the easterly line of Twelfth Avenue, as laid out and established by Chapter 182 of the Laws of 1837.

Found.—F. K. P.

## XIII.

491

That all of the lands described in the grants set forth in Findings I and III, except such as lie easterly of a line a few feet easterly of the easterly side of Twelfth Avenue and except the lands under water over which the piers at the foot of 39th and 40th Streets, respectively, extend, are open navigable waters of the State of New York and used as such for the purposes of commerce and navigation.

Found.—F. K. P.

## XIV.

492

That pursuant to the authority vested in him by virtue of Section 571 of the Greater New York Charter, the Commissioner of Docks of The City of New York adopted certain rules and regulations prohibiting any filling in of the lands under water adjacent to the shores of Manhattan Island without his written permission.

Found.—F. K. P.

## XV.

That neither the plaintiffs nor their predecessors in title have obtained the permission of the Commissioner of Docks to fill in the premises described in the complaint between the easterly side of Twelfth Avenue and the bulkhead line established by the Secretary of War, nor have they obtained

*Defendants' Proposed Findings*

493

the consent of the Secretary of War to fill in the lands under water westerly of said bulkhead line.

Found.—F. K. P.

## CONCLUSIONS OF LAW.

## I.

That the title of the Mayor, Aldermen and Commonalty of the City of New York to the lands under water in the Hudson River adjacent to Manhattan Island were subject to the control and regulation of the State and Federal Governments for the purpose of commerce and navigation. 494

Found.—F. K. P.

## II.

That the grants to Robert Latou and Charles E. Appleby, set forth in Findings of Fact I and III were issued subject to such restriction.

Found.—F. K. P.

## III.

That by the establishment of the bulkhead line of 1871 by the City and the establishment of the bulkhead line by the Secretary of War in the year 1890 co-incident therewith, all of the Hudson River westerly thereof was declared to be navigable waters of the State and of the United States, and all obstructions except piers to the free use thereof for the purposes of commerce and navigation were prohibited. 495

Found.—F. K. P.

## IV.

That the piers at the foot of 39th and 40th Streets, respectively, having been erected more than fifty years ago and such piers or replacements thereof having been maintained ever since, no action to restrain the continued maintenance thereof or for the removal thereof will lie.

Refused. Matter of law and fact not proven.—F. K. P.

*Defendants' Proposed Findings*

## V.

(a) That so much of the water of the Hudson River as lie easterly of the aforesaid bulkhead line of 1871 and westerly of the easterly side of Twelfth Avenue are open and in use for purposes of commerce and navigation and (b) cannot be obstructed without the written permission of the Commissioner of Docks, and, therefore (c) no action to restrain or prevent the free use of the same by vessels for loading or unloading at the piers aforesaid will lie.

497

(a) Found.—F. K. P.

(b) Refused.—F. K. P.

(c) Found.—F. K. P.

## VI.

That the failure of Charles E. Appleby and the plaintiffs in this action, as his successors in interest, to pay the taxes imposed upon the premises violated one of the covenants contained in each of the grants set forth in Findings I and III, and that thereby said grants became null and void and of no effect by virtue of their own terms.

498

Refused.—F. K. P.

## VII.

The defendants are entitled to judgment in their favor dismissing the complaint herein upon the merits, that the grants set forth in Findings of Fact I and III are null and void as to the premises described in the complaint, and the defendant, The City of New York, is entitled to the immediate possession of the lands described therein, with costs to said defendant, The City of New York, and the Clerk is directed to enter judgment accordingly.

Refused.—F. K. P.

**Proposed Additional Findings of Fact and Conclusions of Law of The City of New York on the Question of Damages.** 499

SUPREME COURT OF THE STATE OF  
NEW YORK,

COUNTY OF NEW YORK.

Before: Mr. Justice PENDLETON,

Trial Term, Part VII.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Ap-  
pleby, deceased,

Plaintiffs,

*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

500

501

The issue of fact in the above-entitled action as to what, if any, damages had been suffered by the plaintiffs by reason of the dredging by the City of the area between the pierhead line of 1897, the westerly line of Twelfth Avenue, the northerly line of 38th Street and the southerly line of 42d Street, having been duly tried before me at Trial Term, Part VII of this Court, a jury having been waived by the parties, on the 27th day of November and

502 *Defendants' Additional Proposed Findings*

the 2d day of January, 1917, and after hearing the evidence submitted on behalf of the plaintiffs and on behalf of the defendants, and due deliberation having been had thereon, I find as follows:

FINDINGS OF FACT.

I.

503 That on or about the 1st day of May, 1916, the Commissioner of Docks prepared and submitted to the Board of Commissioners of the Sinking Fund an amendment of the amended new plan for improvement of the waterfront between West 38th and West 42d Streets, North River, Borough of Manhattan.

Refused.—F. K. P.

II.

That the Board of Commissioners of the Sinking Fund caused a notice of a public hearing in the matter of such amendment to be published according to law.

504

Refused.—F. K. P.

III.

That such public hearing was duly had before the said Board of Commissioners of the Sinking Fund on June 1, 1916, and on the same date the said Board of Commissioners of the Sinking Fund adopted a resolution approving such amendment of the amended new plan for the improvement of the waterfront between the northerly side of West 38th Street and the southerly side of West 42d Street, North River, Borough of Manhattan.

Refused.—F. K. P.

IV.

That said amendment of the amended new plan for the improvement of the waterfront discontinued

*Defendants' Additional Proposed Findings* 505

the bulkhead line at that locality established in 1890, which was 150 feet westerly and parallel with the westerly side of Twelfth Avenue, and established a new bulkhead line 50 feet westerly and parallel with the westerly side of Twelfth Avenue.

Refused.—F. K. P.

## V.

(a) That in erecting a bulkhead structure on the waterfront for the purpose of retaining the filling-in behind the same, it is necessary to found it upon [or near] a sufficiently hard bottom. 506

Found.—F. K. P.

(b) That the sufficiently hard bottom of the Hudson or North River for such purpose between 38th and 42d Streets is twenty feet below mean low water, either at the bulkhead line established 50 feet westerly of Twelfth Avenue or the discontinued bulkhead line 150 feet westerly of Twelfth Avenue, and was at the same depth in said locality in 1884 and in 1916.

Refused.—F. K. P. 507

## VI.

That the soft, yielding mud lying between the water and such sufficiently hard bottom must be dredged to permit laying the foundation of a bulkhead structure on such sufficiently hard bottom.

Refused.—F. K. P.

## VII.

That the cost of building a bulkhead structure along the bulkhead line established 50 feet westerly of Twelfth Avenue or along the former bulkhead line 150 feet westerly of Twelfth Avenue has not materially changed (since the year 1884) [by reason of the dredging done by the City].

508      *Defendants' Additional Proposed Findings*

Note.—Words in ( ) stricken out, and words in [ ] inserted by Court.

Found.—F. K. P.

CONCLUSIONS OF LAW.

I.

509      That by the establishment of said bulkhead line of June 1, 1916, all of the Hudson River westerly thereof was declared to be navigable waters of the State, and all obstructions, except piers, to the free use thereof for the purposes of commerce and navigation were prohibited.

Refused; immaterial.—F. K. P.

II.

That the plaintiff has suffered no damage [beyond nominal damage] by reason of the dredging of the soft, yielding mud by the City in the area between 38th and 42d Streets westerly of Twelfth Avenue.

Found.—F. K. P.

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**Decision.**

511

SUPREME COURT  
OF THE STATE OF NEW YORK.  
COUNTY OF NEW YORK.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

Plaintiffs,

*against*

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THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

Defendants.

The above entitled action having been tried before me at Special Term of this Court, held in Part III thereof at the County Court House in the County of New York on the 23d day of November, 1915, the 27th day of November, 1916, and the 2d day of January, 1917, and the plaintiffs and defendants having appeared by Counsel, and the testimony presented by the respective parties having been duly heard and considered, I make findings of fact and base upon them conclusions of law as follows:

513

(1) I. The City of New York is a domestic municipal corporation, and is the successor of the Mayor, Aldermen and Commonalty of the City of New York. The Central Railroad Company of New

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Jersey, New York Horse Manure Transportation Company and the Weehawken Stock Yard Company are foreign corporations, organized and existing under the Laws of the State of New Jersey. The New York Butchers Dressed Meat Company, Burns Bros. and New York Stock Yards Company are domestic corporations.

515

(2) II. Under due authority, George B. Smith, City Surveyor, prepared a map, dated March 10th, 1837, showing the projected exterior line of the City of New York extending along the Hudson River from Hammond Street to One Hundred and Thirty-fifth Street. Said map was approved by the Mayor, Aldermen and Commonalty of the City of New York on March 28, 1837, and duly filed in the office of the Street Commissioner of the City of New York, and thereafter adopted by the Legislature of the State of New York on April 12th, 1837, by Chapter 182 of the Laws of 1837.

516

(3) III. Chapter 182 of the Laws of 1837 entitled "AN ACT to establish a permanent exterior street or avenue in the City of New York, along the easterly shore of the North or Hudson's River, and for other purposes" passed April 12, 1837, enacted as follows:

"Sec. 1. The Thirteenth Avenue, as laid out on a map made by George B. Smith, city surveyor, bearing date March tenth, eighteen hundred and thirty-seven, and approved by the mayor, aldermen and commonalty of the city of New York, by a resolution passed in common council on the twenty-eighth day of March, eighteen hundred and thirty-seven (which map is filed in the office of the street commissioner of the City of New York), shall

be the permanent exterior street or avenue in the said city along the easterly shore of the North or Hudson's river between the southerly line of Hammond Street and the northerly line of one Hundred and Thirty-fifth Street.

"Sec. 2. The several streets of the said city as laid out on the map or plan made by the commissioners appointed by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the city of New York, and for other purposes," passed April 3d, 1807, or as subsequently established by law, southerly of and including One Hundred and Thirty-fifth Street, shall be continued and extended westerly along the present lines thereof, from their present terminations, on the said map or plan, respectively, to the said Thirteenth Avenue. Also, the Eleventh Avenue shall be continued and extended, on the said map or plan, along the present line thereof from its present southerly termination at or near Thirty-third Street to Nineteenth Street; and the Twelfth Avenue shall be continued and extended on the said map or plan, along the present line thereof, from Thirty-sixth Street to One Hundred and Thirty-fifth Street.

Sec. 3. The mayor, aldermen and commonalty of the city of New York shall be, and they are hereby, vested with all the right and title of the people of this State to the lands covered with water along the easterly shore of the North or Hudson's river, between Hammond Street and One Hundred and Thirty-fifth Street, and extending from the westerly side of the lands under water, heretofore granted to the said mayor, aldermen and com-

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monalty of the city of New York, by letters patent, in pursuance of the act, entitled "An act relative to improvements in the city of New York," passed February 25th, 1826, to the westerly side of the said Thirteenth Avenue. And the said letters patent shall be construed so as to grant to the said mayor, aldermen and commonalty of the city of New York, and their successors forever, the said lands under water easterly of the westerly line of the said Thirteenth Avenue."

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Sec. 4. The proprietors of the upland shall have the pre-emptive right in all grants made by the said mayor, aldermen and commonalty of the city of New York of any lands under water granted to them by this act.

(4) IV. On or about August 1st, 1853, the Mayor, Aldermen and Commonalty of the City of New York, by an indenture in writing duly executed, acknowledged and delivered, duly bargained, granted, sold and conveyed to Charles E. Appleby, plaintiffs' predecessor in title, for an expressed consideration of \$6,369.37 and certain covenants hereinafter noted.

522

"ALL that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded, described and containing as follows; that is to say:

BEGINNING at a point of intersection of the line of original highwater mark with the line of the centre of Thirty-ninth Street and running thence westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the westerly line or side of

Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said city, as established by law, thence northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed dated New York, June, 1853, made by John I. Serrell, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture. The premises conveyed being colored pink on said map, be the said dimensions more or less.

524

SAVING AND RESERVING from and out of the hereby granted premises so much thereof as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, for the uses and purposes of Public Streets, Avenues and highways as hereinafter mentioned.

525

TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining.

AND also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, of, in and to all

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the said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD the said premises hereby granted to the said Charles E. Appleby, his heirs and assigns to his own proper use, benefit and behoof forever."

(5) V. The map dated June 18, 1853, and made by John I. Serrell, City Surveyor, and annexed to said deed, shows 39th Street and 40th Street,  
527 Twelfth and Thirteenth Avenues as laid out thereon.

(6) XIV. Said deed to Appleby was duly recorded in the office of the Register of New York County and a duplicate or counterpart thereof filed in the Comptroller's office of said City.

(7) XV. At the time when the said deed to Appleby was made, executed and delivered, Chapter 182 of the Laws of 1837 was in full force and effect.

(8) XVII. As the language in the said deed to  
528 Robert Latou is in all material respects the same as that in the said deed to said Charles E. Appleby, the preceding findings of fact in relation to the Appleby deed are hereby found in respect to the said Latou deed.

(9) XVIII. Said deed to Latou was duly recorded in the Register's office of New York County and a duplicate or counterpart thereof filed in the Comptroller's office of said City.

(10) XIX. On or about January 12th, 1853, said Robert Latou sold and conveyed to Charles E. Appleby, all of the premises hereinafter mentioned in the 35th finding of fact, by deed duly recorded in the Register's office of New York County.

(11) XX. That said Charles E. Appleby continued the sole owner of both the aforesaid premises until December 15th, 1913, when he died, leaving him surviving his two sons, Edgar S. Appleby and John S. Appleby, the plaintiffs herein, to whom he devised and bequeathed all of his property, including said premises by a Last Will and Testament duly probated and filed.

(12) XXa. Neither the plaintiffs nor their predecessors in title have ever parted with any right or title in and to said premises or to any right, privilege, easement or emoluments therein or appurtenant thereto. 530

(13) XXI. Said Charles E. Appleby filled in a portion of said premises from high water mark out to a point about 4 feet East of the Easterly line of Twelfth Avenue and made the land in the streets to that point.

(14) XXII. That said Charles E. Appleby and his predecessor or successors in title have never been required to build or erect the streets, wharves or bulkheads over the remaining portion of said premises, and the plaintiffs and their predecessors in title have kept and performed and complied with all of the articles, covenants and agreements contained in said grants, except as to taxes. 531

(15) XXIV. The Harbor Commissioner's map of 1857 shows a pierhead line 500 feet west of Twelfth Avenue, which is west of the plaintiffs' premises, and the pierhead line has since that time been moved 300 feet further west of plaintiffs' premises.

(16) XXV. On April 5th, 1870, the Legislature passed an act (Chapter 137 of the Laws of 1870)

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to reorganize the local government of the City of New York, and the Department of Docks was thereby created.

(17) XXVII. The plan contemplated in the act of 1871 was determined upon by the Department of Docks and adopted by the Commissioners of the Sinking Fund on April 27th, 1871.

(18) XXVIII. The plan of 1871 contained a proposed bulkhead line 150 feet westerly from and parallel with Twelfth Avenue and a pierhead line 500 feet westerly from and parallel with the proposed bulkhead line. The pierhead line was approximately 250 feet west of the plaintiffs' premises hereinbefore mentioned.

(19) XXIX. Said plan was subsequently amended by fixing the pierhead line 200 feet further westerly, that is 700 feet west of the proposed bulkhead line and 450 feet west of the plaintiffs' premises.

(20) XXX. Said plan of 1871 provides that that portion of plaintiffs' premises between Twelfth Avenue and a line 150 feet westerly therefrom and parallel therewith should be acquired by said City as a part of the marginal wharf, way or place, and that the remaining portion of plaintiffs' premises should be acquired for bulkheads and docks, slips or basins appurtenant to the piers, which piers were to be erected in 39th Street, 40th Street and 41st Street and to extend westerly to the pierhead line.

(21) XXXI. On June 11, 1891, the Department of Docks of said City adopted certain preambles and resolutions to acquire title to plaintiff's said premises for the purpose of carrying out the im-



provement of the water front as provided for by the plan of 1871.

(22) XXXII. On or about December 18, 1894, the Mayor, Aldermen and Commonalty of the City of New York, acting by and through the Department of Docks instituted a proceeding to acquire all the right and title to and possession of the wharf property, rights, terms, easements, emoluments and privileges of and to the land under water and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River between 39th and 41st Streets and between Twelfth and Thirteenth Avenues, pursuant to the said plan.

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(23) XXXIII. In the said petition for the appointment of Commissioners of Estimate, it is alleged among other things

“that said Department of Docks, acting for and on behalf of said City, has deemed and still deem it proper and it has heretofore seemed and still seems necessary for the improvement of the water front of said City to acquire title to all of the aforesaid premises, rights, etc., describing same by metes and bounds, and being the same premises which are involved in this action. That all of said premises, rights, etc., were during the negotiations for their purchase, and still are owned by Charles E. Appleby.”

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“That the said City has not now and at the time stated therein, had not any right or title in or to or pertaining to any of the wharfage property therein before described, and

“that the interests of the public and the demands of commerce for that section of the City cover the acquisition of said property.”

(24) XXXIV. By an order of the Supreme Court dated December 31st, 1894, the Commissioners of Estimate in said proceeding were duly appointed, duly filed their oaths, and the said Charles E. Appleby filed his claim with said Commissioners, but no report by the Commissioners has been made and no awards were ever paid, and on July 30th, 1914, the Board of Estimate and Apportionment of the City of New York adopted a resolution attempting to discontinue said proceeding under Section 1000 of the Greater New York Charter.

(25) XXXV. On or about January 3d, 1900, the Department of Docks of the City of New York constructed, according to said plan, a pier in 39th Street 150 feet west of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue, and on or about July 24th, 1902, the City widened the approach to said pier to the same width of the pier; and on or about September 27th, 1907, authorized the construction and maintenance of a dumping board with necessary runway, scale house, tool house and shelter for workmen on said pier. Said dumping board encroaches beyond the lines of the proposed street for a distance of about 40 feet 3 inches east of Thirteenth Avenue by 13 feet 3½ inches north of the northerly line of 39th Street cattle runway.

(26) XXXVI. On or about December 29th, 1911, the Dock Department and the City of New York constructed a pier in 40th Street, beginning about 4 feet east of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue, and on or about June 21st, 1912, constructed an iron or steel shed over that portion of the pier beginning at a point about 150 feet west of Twelfth Avenue, and extending to and beyond Thirteenth Avenue.

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(27) XXXVII. On or about November 26th, 1904, the Dock Department of the City of New York constructed or caused to be constructed a pier in 41st Street from a point 4 feet east of Twelfth Avenue and extending to and beyond Thirteenth Avenue, and on or about August 26th, 1906, constructed or caused to be constructed an iron or steel shed upon said pier beginning at a point about 150 feet west of Twelfth Avenue and extending westerly to and beyond Thirteenth Avenue. The fence across 41st Street about 4 feet east of the easterly line of Twelfth Avenue was constructed on or about September 10th, 1912.

542

(28) XXXIX. Said piers were constructed without the consent and against the will of the plaintiffs or their predecessors in title and without compensation to them.

(29) XL. After the construction of said piers, the plaintiffs' premises have been frequently excavated and dredged by the defendant, the City of New York, its servants and agents.

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(30) XLI. That as a consequence of the use of the sides of said piers for boats, they navigate in the waters over plaintiffs' said premises. The boats and water craft in using the sides of said piers have remained in the waters over the plaintiffs' premises, and the defendants intend to continue these acts in the future.

(31) XLVII. That the City of New York has received a large amount of rent, incomes and profits from the said leases and permits.

(32) XLVIII. That all of the acts of the defendants hereinbefore referred to have been without the consent of the plaintiffs or their predecessors in

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*Decision*

title and against their will and without compensation to them.

(33) L. That the State and Federal authorities have from time to time proposed or fixed or established bulkhead and pierhead lines in and about the plaintiffs' premises hereinbefore described, and that the pierhead line is now, and at all times herein mentioned, was west of the premises between the streets and avenues hereinbefore described.

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(34) LI. That the plaintiffs duly filed their claim with the Comptroller of the City of New York prior to the commencement of this action.

(35) L. That on or about the 24th day of December, 1852, the Mayor, Aldermen and Commonalty of the City of New York granted unto Robert Latou certain lands under the waters of the Hudson River adjacent to the Island of Manhattan, between ~~30~~<sup>40</sup>th and ~~4th~~<sup>41st</sup> Streets, in the words and figures following, to wit:

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"THIS INDENTURE, made the twenty-fourth day of December, one thousand eight hundred and fifty-two.

Between THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, of the first part, and ROBERT LATOU of the second part.

WITNESSETH, that the said parties of the first part for and in consideration of the sum of Four thousand nine hundred and thirty-seven 50/100 dollars lawful money of the United States of America to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged HAVE granted,

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bargained, sold, aliened, released and conveyed and by these presents do grant, bargain, sell, alien, release and convey unto the said party of the second part and to his heirs and assigns

ALL THAT certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York and bounded, described and containing as follows, that is to say:

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BEGINNING at the point of intersection of the line of original high water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law; thence northerly along the westerly line or side of the Thirteenth Avenue two hundred and fifty-eight feet four and a half inches to the line of the centre of Forty-first Street; thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction along said line of original high water mark as it runs to the point or place of beginning.

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As particularly described, designated and shown on a map hereto annexed dated New York, December, 1852, made by John I. Serrell, City Surveyor, and to which reference may be had said map being considered a part

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of this indenture the premises conveyed being colored pink on said map be the same dimensions more or less.

551

SAVING AND RESERVING from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned.

TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

AND ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part of in and to the said premises and every part and parcel thereof with the appurtenances.

552

TO HAVE AND TO HOLD the said premises hereby granted to the said Robert Latou, his heirs and assigns to his own proper use, benefit and behoof forever.

AND the said party of the second part for himself his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part their successors and assigns that the said party of the second part his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part or their successors at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished

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according to any resolution or ordinance of the said parties of the first part or their successors already passed or adopted or that may hereafter be passed or adopted four good and sufficient Bulkheads, wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets as fall within the limits of the premises first above described and are reserved as aforesaid from out thereof for public streets.

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AND will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

AND also that the said party of the second part his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets which the said party of the second part hath covenanted and agreed to make, erect and build as aforesaid and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part.

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AND their successors shall from time to time erect and pass or make relative thereto.

AND also that the said streets or avenues shall forever thereafter continue to be and remain public streets or avenues and highways for the free and common use and passage of the inhabitants of said City and all others passing and repassing by, through and along the

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same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now are or lawfully ought to be and in case default shall be made by the said party of the second part, his heirs and assigns in building, erecting, making or finishing the said bulkheads, wharves, streets or avenues by him covenanted herein to be built, erected, made and finished and in filling in the same or any part thereof or in complying with any ordinance, resolution or order of the said parties of the first part or their successors when required, then and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make or finish the bulkhead, wharves, streets or avenues as aforesaid and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof together with the interest thereon.

AND all costs and charges of the proceedings relative to the same or to sell and dispose of the whole of the said hereby granted premises or any part thereof at public auction for the most that can be had for the same and in case of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns the amount of such deficiency or to adopt and pursue any legal right or remedy that the said parties of the first part or their successors now possess and enjoy under and by



virtue of any act of the Legislature of the State of New York or that may hereafter be granted unto the said parties of the first part or their successors by the Legislature of the State of New York or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues and the right of receiving the wharfage, crannage and profits arising to and from the same to any other person or persons, their heirs and assigns forever. 560

AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully imposed or levied upon the hereby granted premises under and by virtue of any act or acts of the Congress of the United States of America or of any act ordinance or resolution of the said parties of the first part or their successors. 561

AND it is hereby further covenanted and agreed by and between the parties to these presents and the true intent and meaning hereof is that the said party of the second part his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part or their successors and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of

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the hereby granted premises without the permission of the said parties of the first part their successor or assigns first had for that purpose.

563

AND the said parties of the first part for themselves their successors and assigns do covenant and agree to and with the said party of the second part his heirs and assigns that he the said party of the second part his heirs and assigns observing fulfilling and keeping all and singular the articles, covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents shall and lawfully may from time to time and at all times hereafter fully have and enjoy, take and receive and hold to his own proper use all manner of wharfage crantage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River with full power to collect and receive the same for his own proper use and benefit forever.

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EXCEPTING therefrom such wharfage crantage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half part of Fortieth Street and the southerly half part of Forty-first Street which shall be and are hereby reserved for the said parties of the first part their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

AND it is hereby further agreed by and between the parties to these presents and the true

intent and meaning hereof is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen of said parties of the first part or their successors or to operate further then to pass the estate right title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several Charters and the various acts of the Legislature of the People of the State of New York.

566

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof seized of a good sure absolute and indefeasible estate of inheritance in fee simple of in and to the lands and premises on the easterly side of the premises hereby granted and adjoining the same or if the said party of the second part his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part.

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AND behalf to be observed performed fulfilled and kept then and in every such case these presents and every article clause or thing herein contained shall be and become absolutely null and void and the said parties of the first part and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted shall thereafter be seized of the same with the appurtenances free clear and discharged of and from any claim right or pretence of claim or right of the said

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party of the second part his heirs and assigns anything herein contained to the contrary notwithstanding.

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AND the said party of the second part covenants and agrees to pay the assessment and the interest due and to grow due thereon for building the sewer in Forty-second Street assessed upon the premises hereby granted and also to pay all expenses which have been incurred by said parties of the first part for regulating the street embraced in the grant between the High Water Mark and the permanent exterior line of said City.

570

AND the said party of the second part for himself his heirs and assigns do hereby covenant and agree to and with the said parties of the first part their successors and assigns that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants conditions and agreements undertakings and provisions herein contained and on his part to be kept performed and complied with.

WITNESSETH WHEREOF to one part of these presents remaining with the said parties of the first part the said party of the second part hath set his hand and seal and to the other part thereof remaining with the said party of the second part the said parties of the first part have caused the common seal of the City of New York to be affixed the day and year first above written.

A. C. KINGSLAND, Mayor. BY THE COMMON COUNCIL, D. I. Valentine, Clk. C. C. (LS.)

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CITY AND COUNTY OF NEW YORK, ss.:

On this 30 day of December, 1852, before me came David I. Valentine to me personally known who being by me duly sworn deposed and said he is a resident of the City and County of New York that he is the Clerk of the Common Council of said City that the seal affixed to the within grant is the common seal of said City and was so affixed by their authority.  
Geo. L. Taylor, Comr. of Deeds."

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and which said grant, together with the map therein referred to, was recorded in the office of the Register of the City and County of New York on the 3d day of January, 1853, in Liber 623 of Conveyances, page 170.

(36) II. That by sundry mesne conveyances all the right, title and interest which the said Robert Latou acquired under the aforesaid grant set forth in Finding 35 vested in Charles E. Appleby subject to the conditions of said grant.

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(37) III. That on or about the 1st day of August, 1853, the Mayor, Aldermen and Commonalty of the City of New York granted to Charles E. Appleby certain lands under water in the Hudson River adjacent to the Island of Manhattan, between <sup>39</sup>~~40~~th and <sup>40</sup>~~41st~~ Streets, and that said grant to the said Charles E. Appleby in other respects contained substantially the same provisions, conditions, covenants and reservations as those contained in the aforesaid grant to Robert Latou, set forth in Finding 35.

(38) IV. That said Charles E. Appleby died seized of the premises described in the grants referred to in Findings 35 and 37, subject to the conditions thereof, on the 15th day of December, 1913,

leaving a last will and testament wherein and whereby he devised the premises described in said grants set forth in Findings 35 and 37 to his sons Edgar S. Appleby and John S. Appleby, the plaintiffs in this action, and appointed the said sons executors of his said last will and testament. That said last will and testament was duly admitted to probate in the office of the Surrogate of Monmouth County, New Jersey, on or about the 26th day of December, 1913, and an exemplified copy thereof, 575 duly authenticated, filed in the office of the Surrogate of New York County on January 23, 1914; and letters testamentary were duly issued to Edgar S. Appleby and John S. Appleby.

(39) V. That pursuant to the provisions of Chapter 182 of the Laws of 1837, Twelfth and Thirteenth Avenues and 39th and 40th Streets were duly laid out, created, extended and established over the lands under water described in the grants set forth in Findings 35 and 37.

(40) VI. That between the years 1850 and 1857 the Mayor, Aldermen and Commonalty of the City of New York caused or permitted to be erected piers within the lines of 39th and 40th Streets respectively, as said streets were laid out, pursuant to Chapter 182 of the Laws of 1837, referred to in Finding 39, and that a pier within the lines of each of said streets has been ever since and continuously maintained.

(41) VII. That the State of New York, by Chapter 763 of the Laws of 1857, established a bulkhead line through the premises described in the grants set forth in Findings 35 and 37, and 100 feet westerly of the westerly line of Twelfth Avenue, as laid out and established by Chapter 182 of the Laws of 1837.

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(42) VIII. That Chapter 763 of the Laws of 1857 also prohibited the filling in with earth, stone and other solid material beyond the bulkhead line so established.

(43) IX. That on the 13th day of April, 1871, the Mayor, Aldermen and Commonalty of the City of New York, by virtue of the authority in them vested by Chapter 574 of the Laws of 1871, adopted a plan for the improvement of the waterfront of the City and established a bulkhead line or line of solid filling across the premises described in the grants set forth in Findings 35 and 37, parallel to and 50 feet west of the bulkhead line described in Finding 41. 578

(44) X. That in the year 1890, the Secretary of War under and in pursuance of the authority vested in him by Act of Congress adopted and established a bulkhead line over and across the lands under water described in the complaint; which said bulkhead line was and is co-incident with the bulkhead line described in Finding 43. 579

(45) XI. That neither Charles E. Appleby nor the plaintiffs in this action have paid any taxes levied upon the premises described in the grants set forth in Findings 35 and 37 since the year 1894, except as stated in annexed stipulation.

(46) XII. That neither Robert Latou, nor any successor in interest of the said Robert Latou, nor the said Charles E. Appleby, nor the plaintiffs in this action, nor the Mayor, Aldermen and Commonalty of the City of New York, nor The City of New York, have filled in any of the lands described in the grants referred to in Findings 35 and 37 beyond a few feet easterly of the easterly line of Twelfth Avenue, as laid out and established by Chapter 182 of the Laws of 1837.

(47) XIII. That all of the lands described in the grants set forth in Findings 35 and 37, except such as lie easterly of a line a few feet easterly of the easterly side of Twelfth Avenue and except the lands under water over which the piers at the foot of 39th and 40th Streets, respectively, extend, are open navigable waters of the State of New York and used as such for the purposes of commerce and navigation.

(48) XIV. That pursuant to the authority vested in him by virtue of Section 571 of the Greater New York Charter, the Commissioner of Docks of The City of New York adopted certain rules and regulations prohibiting any filling in of the lands under water adjacent to the shores of Manhattan Island without his written permission.

(49) XV. That neither the plaintiffs nor their predecessors in title have obtained the permission of the Commissioner of Docks to fill in the premises described in the complaint between the easterly side of Twelfth Avenue and the bulkhead line established by the Secretary of War, nor have they obtained the consent of the Secretary of War to fill in the lands under water westerly of said bulkhead line.

(50) I. Plaintiffs' said premises along the bulkhead line have been dredged from a depth of 3 feet to a depth of 20 feet below mean low water.

(51) VI. The tax liens involved in the two actions of the City of New York against Edgar S. Appleby and another, have been satisfied by the payment of \$74,426.01.

(52) V. That in erecting a bulkhead structure on the waterfront for the purpose of retaining the



filling-in behind the same, it is necessary to found it upon or near a sufficiently hard bottom.

(53) VII. That the cost of building a bulkhead structure along the bulkhead line established 50 feet westerly of Twelfth Avenue or along the former bulkhead line 150 feet westerly of Twelfth Avenue has not materially changed by reason of the dredging done by the City.

### CONCLUSIONS OF LAW.

584

(1) 1. That the State of New York has succeeded to all the rights of both the Crown and Parliament in the navigable waters and soil underneath them and was vested with the *jus privatum* or ownership of the soil, and the *jus publicum* or the dominion and control of the navigable waters.

(2) 2. That the Legislature of the State of New York, subject to the restriction imposed by the Federal Constitution, or the Constitution of this State, has the absolute and uncontrollable power to grant the navigable waters in this State, and the land underneath thereof. 585

(3) 6. By the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Charles E. Appleby and Robert Latou, set forth in the amended complaint, the grantees and their assigns, acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds, with the right to fill in and improve the same at their pleasure, subject to the *jus publicum* and the Federal Government's power to control.

(4) 8. Subject to the proper regulations of the State or the Federal authorities, the plaintiffs here-

in could fill in said premises or improve the same with wharves and piers.

(5) 9. The right to fill in or improve said premises as aforesaid, is a vested property right which can not be taken from the plaintiffs, without compensation, except by the paramount right of the Federal Government or the exercise of the *jus publicum*.

587 (6) 10. The deeds hereinbefore mentioned should be construed according to the intent of the parties.

(7) 11. The provisions of Chapter 182 of the Laws of 1837 were in full force and effect at the time of the deeds to Appleby and Latou, and said deeds were made and accepted with knowledge of and reliance upon the provisions and effect of said Act.

588 (8) 13. Easements of light, air and access in the streets and avenues shown on the maps annexed to the deeds to Appleby and Latou, passed upon the delivery of said deeds and are now owned and possessed by the plaintiffs herein to become effective whenever ~~plaintiffs~~ <sup>plaintiffs</sup> lands are filled in.

(9) 14. The City of New York has no easement of access by boats over the plaintiffs' premises to the piers in 39th, 40th and 41st Streets between Twelfth and Thirteenth Avenues, and it has no right to dock or moor boats over plaintiffs' said premises, or to use said premises for slips or basins, appurtenant to said piers but until filled in, the waters over plaintiffs' land are navigable waters subject to public use as such.

(10) 17. Chapter 763 of the Laws of 1857, and the Harbor Commissioner's map of 1857, are not

effective as to plaintiffs. Said act and map do not affect the premises at the present time and have no bearing upon the plaintiffs' rights or title herein.

(11) 20. The Acts of Congress and the designation by the Secretary of War of bulkhead and pier-head lines did not vest in the City of New York any right or title to the plaintiffs' premises and did not confer upon said city any easements or rights to use plaintiffs' premises for slips and basins, or for access to the piers in the streets.

590

(12) 25. The plaintiffs should have the costs of this action.

(13) 27. Either party to this action may move at the foot of the judgment for further direction as to the enforcement of the same.

(14) VII. The covenant by the grantee, that he, his heirs and assigns

"will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,"

591

relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

(15) VIII. The covenant by the grantee, that he, his heirs and assigns

"will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby

granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose."

refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues.

593 (16) XXIII. The provisions of Chapter 763 of the Laws of 1857 have been repealed except so far as they have been incorporated in the subsequent consolidation acts and Charters (Chapter 410 of the Laws of 1882; Chapter 378 of the Laws of 1897 and Chapter 466 of the Laws of 1901) of the City of New York, in so far as it affects the plaintiffs' rights and title.

594 (17) 1. That the title of the Mayor, Aldermen and Commonalty of the City of New York to the lands under water in the Hudson River adjacent to Manhattan Island were subject to the control and regulation of the State and Federal Governments for the purpose of commerce and navigation.

(18) II. That the grants to Robert Latou and Charles E. Appleby, set forth in Findings of Fact 35 and 37 were issued subject to such restriction.

(19) III. That by the establishment of the bulkhead line of 1871 by the City and the establishment of the bulkhead line by the Secretary of War in the year 1890 co-incident therewith, all of the Hudson River westerly thereof was declared to be navigable waters of the State and of the United States, and all obstructions except piers to the free use thereof for the purposes of commerce and navigation were prohibited.

*Decision*

595

(20) V. That so much of the water of the Hudson River as lie easterly of the aforesaid bulkhead line of 1871 and westerly of the easterly side of Twelfth Avenue are open and in use for purposes of commerce and navigation and no action to restrain or prevent the free use of the same by vessels for loading or unloading at the piers aforesaid will lie.

(21) 3. The City of New York is without right to excavate, dredge or remove any soil or part of the granted premises between the streets and avenues east of the bulkhead line. 596

(22) 4. The City of New York, its agents, servants, contractors, representatives or assigns, or any person or persons whatsoever claiming to have authority from the said City should be enjoined from excavating, dredging or removing the soil of plaintiffs' said premises.

(23) 10. The City of New York should be enjoined and compelled to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street. 597

(24) II. That the plaintiff has suffered no damage beyond nominal damages by reason of the dredging of the soft yielding mud by the City in the area between 38th and 42d Streets westerly of Twelfth Avenue.

(25) That judgment be entered herein in accordance with the foregoing findings of fact and conclusions of law.

F. K. PENDLETON,

*J. S. C.*

Dated, July 13, 1917.

598

**Stipulation.**

SUPREME COURT,

NEW YORK COUNTY.

EDGAR S. APPLEBY and another, etc.,  
 Plaintiffs,

*against*

THE CITY OF NEW YORK, et al.,  
 Defendants.

599

IT IS HEREBY STIPULATED that the tax liens involved in the two actions of the City of New York against Edgar S. Appleby have been satisfied by the payment of \$74,426.01 and that a finding to that effect may be made in the decision.

Dated, New York, January 24th, 1917.

BANTON MOORE,  
 Attorney for Plaintiffs.

LAMAR HARDY,  
 Corporation Counsel,  
 Attorney for Defendants.

600

**Judgment.**

601

At a Special Term of the Supreme Court, Part III thereof, held in and for the County of New York at the County Court House in said County on the 13th day of July, 1917.

Present: Hon. FRANCIS K. PENDLETON, *Justice*.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as Executors of the Last  
Will and Testament of Charles E. Appleby, deceased,

602

Plaintiff

*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS' DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK YARDS  
COMPANY, WEEHAWKEN STOCK YARD  
COMPANY,

603

Defendants.

The issues in this action having been regularly brought on for trial and tried before Mr. Justice PENDLETON at a Special Term of the Supreme Court, Part III thereof, held at the County Court House in the County of New York on the 23d day of November, 1915, the 27th day of November, 1916, and the 2d day of January, 1917, and the plaintiffs having appeared by Banton Moore, their attorney, and the defendant, The City of New York, having appeared by Edwin J. Freedman, Esq., Assistant Corporation Counsel, and the defendant, Central

601

*Judgment*

Railroad Company of New Jersey having appeared at that part of the trial on the 23d day of November, 1915, by DeForest Brothers, Esqs., their attorneys, and it appearing that the other defendants were duly served with the summons and amended complaint herein, and that Weehawken Stock Yard Company appeared by Stetson, Jennings & Russell, its attorneys, and Burns Bros. appeared by Charles Runyon, its attorney, and the remaining defendants did not appear or answer, and the Court having heard all the allegations and proof of the parties, and after due deliberation, having duly made and filed a decision in writing containing its findings of fact and conclusions of law concerning the issues raised by the pleadings, and the matters in controversy between the parties, with the direction of the entry of a judgment in accordance therewith.

605 And the costs of the plaintiffs having been duly adjusted at the sum of \$124.39, it is

606 ORDERED, ADJUDGED AND DECREED that the City of New York, its agents, servants, contractors, representatives or assigns, or any person or persons whatsoever claiming to have authority from said City be and they hereby are enjoined from excavating, dredging or removing the soil of plaintiffs' said premises, and it is further

ORDERED, ADJUDGED AND DECREED that the City of New York be and it is hereby enjoined and compelled to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs recover from the defendant, The City of New



*Judgment*

607

York, the sum of \$124.39 for costs and disbursements as taxed herein, and that execution issue therefor thirty days after the entry of this judgment, and

That either party to this action may move at the foot of the judgment for further direction as to the enforcement of the same, and for such further relief as they may be advised.

Enter

F. K. P., 608  
J. S. C.

WM. F. SCHNEIDER,  
Clerk.

609

COUNTY OF NEW YORK.

611

*against*

### Defendants.

612

PLEASE TAKE NOTICE that the plaintiffs above-named and each of them hereby except to the decision of the Court ~~made~~ in this action and filed in the office of the Clerk of New York County on the 25th day of July, 1917, and specifically as follows:

1. To that part of Finding of Fact number (14) XXII, containing the words "except as to taxes."
2. To the Finding of Fact numbered (30) XLI, insofar as it finds that boats navigate in the water

*Plaintiffs' Exceptions to Decision*

613

over plaintiffs' said premises, and implies that said waters are navigable.

3. To the Finding of Fact numbered (35) I, in that said finding in the first paragraph thereof erroneously recites "between 39th and 40th Streets" instead of between 40th and 41st Streets.

4. To the Finding of Fact numbered (37) III, in that said finding erroneously recites "between 40th and 41st Streets" instead of between 39th and 40th Streets.

614

5. To the Finding of Fact numbered (40) VI, and each and every part thereof.

6. To the Finding of Fact numbered (41) VII, and each and every part thereof.

7. To the Finding of Fact numbered (42) VIII, and each and every part thereof.

8. To the Finding of Fact numbered (43) IX, and each and every part thereof.

9. To the Finding of Fact numbered (44) X, and each and every part thereof.

615

9a. To the Finding of Fact numbered (45) XI and each and every part thereof.

10. To the Finding of Fact numbered (47) XIII, and separately to that part which finds that all the lands described in the grants between Twelfth and Thirteenth Avenues, 39th and 41st Streets are open navigable waters of the State of New York and used as such for the purposes of commerce and navigation.

11. To the Finding of Fact numbered (48) XIV, and separately to that part which finds that the

616

*Plaintiffs' Exceptions to Decision*

Commissioner of Docks, pursuant to Section 571 of the Greater New York Charter or otherwise of the City of New York has prohibited or can prohibit the filling in of the plaintiffs' lands under water.

13. To the Finding of Fact numbered (53) VII, and each and every part thereof.

~~13. To the Finding of Fact numbered (33) VII, and each and every part thereof.~~

617

14. To the Conclusion of Law numbered (3) 6, insofar as it decides that the plaintiffs' right to fill in and improve their premises is "subject to the *jus publicum* and the Federal Governments power to control."

15. To the Conclusion of Law numbered (4) 8, in that the State cannot regulate the filling in and improving of plaintiffs' premises in the manner claimed by defendants.

618

16. To the Conclusion of Law numbered (5) 9, insofar as it decides that the plaintiffs' rights to fill in and improve their premises can be taken from the plaintiffs without compensation by the Federal Government or the exercise of the *jus publicum*.

16a. To the Conclusion of Law numbered (6) 10, as modified.

17. To the Conclusion of Law numbered (8) 13, insofar as it decides that the easements in the streets and avenues do not become effective until plaintiffs' lands are filled in.

18. To the Conclusion of Law numbered (9) 14, insofar as it decides that "until filled in, the water over plaintiffs' land are navigable waters subject to public use as such."

*Plaintiffs' Exceptions to Decision*

619

19. To the Conclusion of Law numbered (17) I, and each and every part thereof.

20. To the Conclusion of Law numbered (18) II, and each and every part thereof.

21. To the Conclusion of Law numbered (19) III, and each and every part thereof.

22. To the Conclusion of Law numbered (20) V, and each and every part thereof.

23. To the Conclusion of Law numbered (21) 3, insofar as it decides or infers that the City has a right to excavate, dredge or remove the soil from plaintiffs' premises west of the bulkhead line. 620

24. To the Conclusion of Law numbered (24) II, and each and every part thereof.

25. The said plaintiffs further except to the refusal of the Court to make as requested by the plaintiffs, Findings of Fact numbered VI, IX, X, XI, XII, XIII, XVI, XXII, XXVI, XXXV, XXXVIII, XL, XII, XLII, XLIII, XLIV, XLV, XLVI, and XLIX, and the additional Findings of Fact numbered II, III, IV and V. 621

Plaintiffs and each of them further and specifically except to the refusal of the Court to make the Conclusions of Law, proposed by the defendants, numbered 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 18, 19, 21, 22, 23, 24 and the additional Conclusions of Law numbered 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 13, 14,

622

*Plaintiffs' Exceptions to Decision*

15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 25a, 26,  
27, 28, 29, 30 and 31.

Dated, New York, September 17th, 1917.

Yours, etc.,

BANTON MOORE,  
Attorney for Plaintiffs,  
1 Liberty Street,  
Borough of Manhattan,  
City of New York.

623 To:

LAMAR HARDY, Esq.,  
Corporation Counsel,  
Attorney for Defendant,  
City of New York.

WILLIAM F. SCHNEIDER, Esq.,  
County Clerk of the  
County of New York.

DE FOREST BROTHERS, Esqs.,  
Attorneys for Central Railroad  
Company of New Jersey.

624

STETSON, JENNINGS & RUSSELL, Esqs.,  
Attorneys for Weehawken  
Stock Yard Company.

CHARLES RUNYON, Esq.,  
Attorney for Burns Bros.

FARRELL & ASCH, Esqs.,  
Attorneys for New York Butchers  
Dressed Meat Company.

**Exceptions to Decision of Defendant** 625  
**City of New York.**

**SUPREME COURT**  
**OF THE STATE OF NEW YORK,**  
**COUNTY OF NEW YORK.**

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
 individually and as executors of the Last  
 Will and Testament of Charles E. Apple-  
 by, deceased,

Plaintiffs,

626

*against*

THE CITY OF NEW YORK and others,  
 Defendants.

The above-named defendant, The City of New York, excepts to the conclusions of law as found by the Court in favor of the plaintiff and embodied in the decision herein filed in the office of the Clerk of this Court on the 25th day of July, 1917, as follows: 627

Conclusions of law numbered (4) 8, (5) 9, (8) 13, (9) 14, (10) 17, (11) 20, (12) 25, (14) VII, (21) 3, (22) 4, (23) 10, (24) 11.

And the said defendant, The City of New York excepts to the refusal of the Court to make the following conclusions of law proposed by said defendant, as follows:

Conclusions of law numbered IV, V, VI and VII.

And further excepts to the refusal of the Court to make the following additional findings of fact and conclusions of law proposed by said defendant, The City of New York to wit:

628

*Defendants' Exceptions to Decision*

Additional findings of fact numbered I, II, III, IV, VI, and to the modifications by the Court of proposed additional finding of fact numbered V; proposed additional conclusion of law numbered I and to the modification by the Court of proposed additional conclusion of law numbered II.

Dated, New York, September 25, 1917.

629

LAMAR HARDY,  
Corporation Counsel,  
Attorney for the Defendant,  
The City of New York.

To:

WILLIAM F. SCHNEIDER, Esq.,  
Clerk of New York County.

BANTON MOORE, Esq.,  
Attorney for the Plaintiffs.

630



**Exceptions to Decision of Defendant  
Weehawken Stock Yard Co.**

631

SUPREME COURT,  
COUNTY OF NEW YORK.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as executors of the Last  
Will and Testament of Charles E. Apple-  
by, deceased,

Plaintiffs,

*against*

632

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROTHERS, NEW YORK STOCK  
YARDS COMPANY, WEEHAWKEN STOCK  
YARD COMPANY,

Defendants.

2504—1914.

The above-named defendant, Weehawken Stock  
Yard Company, excepts to the conclusions of law  
as found by the Court in favor of the plaintiff and  
embodied in the decision herein filed in the office  
of the Clerk of this Court on the 25th day of July,  
1917, as follows:

633

Conclusions of law number (4) 8, (5) 9, (8) 13,  
(9) 14, (10) 17, (11) 20, (12) 25, (14) VII, (21)  
3, (22) 4, (23) 10, (24) 11.

And the said defendant Weehawken Stock Yard  
Company excepts to the refusal of the Court to  
make the following conclusions of law proposed by  
defendant The City of New York, as follows:

Conclusions of law numbered IV, V, VI and VII.  
And further excepts to the refusal of the Court

634 *Defendants' Exceptions to Decision*

to make the following additional findings of fact and conclusions of law proposed by said defendant, The City of New York, to wit:

Additional findings of fact numbered I, II and III the modifications by the Court of proposed additional finding of fact numbered V, the proposed additional conclusion of law numbered I, and to the modification by the Court of proposed conclusion of law numbered II.

635 Dated, New York, September 25, 1917.

STETSON, JENNINGS & RUSSELL,

Attorneys for Defendant

Weehawken Stock Yard Company,

Office and P. O. Address,

15 Broad Street,

Manhattan,

New York City.

To:

BANTON MOORE, Esq.,

Attorney for Plaintiffs,

1 Liberty Street,

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Borough of Manhattan,

City of New York.

WILLIAM F. SCHNEIDER, Esq.,

Clerk of the County of New York.

**Case.**

637

**SUPREME COURT,****NEW YORK COUNTY.****SPECIAL TERM—PART III.**

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as executors of the Last  
Will and Testament of Charles E. Apple-  
by, deceased,

Plaintiffs,

*against*

638

THE CITY OF NEW YORK, EBEN E. OLCOTT,  
CENTRAL RAILROAD COMPANY OF NEW  
JERSEY, NEW YORK BUTCHERS DRESSED  
MEAT COMPANY, NEW YORK HORSE  
MANURE TRANSPORTATION COMPANY,  
BURNS BROTHERS, NEW YORK STOCK  
YARDS COMPANY, WEEHAWKEN STOCK  
YARD COMPANY,

Defendants.

Before: PENDLETON, J.

639

New York, November 23d, 1915.

## Appearances:

BANTON MOORE, Esq., Attorney for the Plain-  
tiff. CHARLES F. BROWN, Esq., of Counsel.

FRANK L. POLK, Esq., Corporation Counsel,  
representing the City. E. J. FREEDMAN,  
Esq., of Counsel.

DEFOREST BROTHERS, Esqs., for the Central  
Railroad of New Jersey. AMOS J. PEAS-  
LEE, Esq., of Counsel.

Messrs. STETSON, JENNINGS & RUSSELL for  
the Weehawken Stock Yard Company.  
R. L. VON BERNUTH, Esq., of Counsel.

*Case*

640

The Court: I understand Judge Scott rendered a decision in this case.

Judge Brown: The decision of the court is based upon grounds we shall contest very seriously.

The Court: I had this case before me also, and held it was not a case for a *pendente lite* injunction.

641

Judge Brown: We don't complain of that. After that decision was made, there was a motion made for leave to go to the Court of Appeals, and upon that motion there was a short *per curiam* opinion made which in some respects modified that decision. The Court said, "The order appealed from denied a motion for a temporary injunction, which we affirmed. As to the motion for reargument, the Court neither overlooked the conceded facts nor the distinction between the cases cited in our opinion and the facts of the present case. The motion for a reargument is therefore denied. There are no

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questions in this case that we can certify to the Court of Appeals which would end the controversy and which, answered in favor of the plaintiff, would entitle it to a temporary injunction before judgment. The questions presented can be properly determined only upon a demurrer to the complaint or a trial of the action at Special Term. While we denied the motion for an injunction as a matter of right, and not in the exercise of discretion, the fact is that on the facts stated in the complaint the plaintiff was not entitled to a temporary injunction. The right of the plaintiff to final judgment could not properly be determined on appeal from this order. The motion for leave to appeal to the Court of Appeals is therefore denied." The motion being denied, we have to try this case.

The Court: This comes here on a complaint and answer, doesn't it?

Judge Brown: Yes. There is a phase of it to which I want to direct your Honor's attention, which is not treated in that opinion, and that is in regard to the 150 feet of this pier west of the west line of Twelfth Avenue.

The Court: You mean east of the line fixed in 1871.

Judge Brown: Yes.

The Court: That occurred to me as I read the opinion.

Judge Brown: Between the line of what they call 644  
on their plan the proposed bulkhead line, which is 150 feet west of Twelfth Avenue, and the westerly line of Twelfth Avenue.

The Court: That is the 1871 line:

Judge Brown: Yes. For some reason or other they don't draw any distinction in that opinion between that line and the line outside of it. That struck me when I read these papers, and reading my learned opponent's brief in the Appellate Division I noticed a statement in that brief that the question as to that 150 feet did not arise in this action. I don't know why he said that. That may 645  
have misled the Court, and perhaps he may say it again here on the trial, but it seems to me that the question arises in this action inasmuch as the complaint described the property between Twelfth and Thirteenth Avenues.

The Court: As I understand it, these piers which have been built out extend from the westerly line of Twelfth Avenue west?

Judge Brown: West.

The Court: And this property over which these boats pass, and which you are now referring to, is the property between Twelfth Avenue and the 1871 line?

Mr. Brown: It is all inside of that, up to the line of Twelfth Avenue.

The Court: Between Twelfth Avenue and the 1871 line. The westerly side of Twelfth Avenue is the present bulkhead.

Mr. Freedman: The easterly side of Twelfth Avenue is the present bulkhead. Twelfth Avenue is not filled in.

647 Judge Brown: In the opinion they treated it as a temporary injunction. As I understand, they say they did not want to decide the merits of this case.

The Court: I don't understand they did. I suppose if you are entitled to an injunction against using any part of the property, why, of course, you are entitled to get it here.

Judge Brown: But if Judge Scott's views of the case are right, we are entitled to an injunction out to the 150 foot line anyway.

648 The Court: I don't know whether his opinion goes to that extent or not, because you have not exercised the right to fill in. I understand from his opinion that what you had a right to do is to fill it in.

Judge Brown: We have a right to fill it in at the present moment. We can fill it in and make the land to that 150 foot line.

The Court: I suppose that is so.

Mr. Freedman: I don't think there is any question about that. I may make a concession in regard to that 150 foot line after recess when I have had an opportunity to consult with the Corporation Counsel.

The Court: In this opinion there is no question really in regard to that 150 feet.

Judge Brown: I don't see how there could be under the Langdon case where they construed a

grant precisely like this. It is not to be construed as the grant in the Staten Island case, which was made for the purpose of promotion of commerce.

The Court: I don't understand that Mr. Freedman takes a different view. He acquiesces in that.

Judge Brown: Your Honor had before you at the same time that the motion was made for a temporary injunction, a motion for the appointment of new commissioners in the condemnation proceeding that has been brought by the City to condemn Mr. Appleby's property. Now, there purported to be, and was, of course, passed a resolution by the Board of Estimate and Apportionment discontinuing that proceeding, but your Honor denied the motion made by Mr. Appleby, with leave to renew after this action was tried; so that I would suppose that, while you wrote no opinion, the effect of that decision was to hold, as was contended by Mr. Appleby's counsel, that the Board of Estimate and Apportionment had no right to discontinue that proceeding in that way, and that that proceeding is now pending and must be deemed to be pending in this suit, because your Honor could not have made an order giving them a right to renew in that proceeding after the trial of this action, if the effect of that resolution had been to discontinue the proceedings.

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The Court: Does that question come up here?

Judge Brown: Yes.

Mr. Freedman: We do not think it does. This is an action for an injunction pure and simple, and the application for a peremptory mandamus has nothing to do with this injunction action.

The Court: Instituted to do what?

Mr. Freedman: To compel the Corporation Counsel to go on with the condemnation proceeding

652

*Case*

which the Board of Estimate and Apportionment by resolution discontinued.

The Court: My view was that after this case was decided, then that question of the peremptory mandamus would come up on its merits, and I did not mean to decide in advance whether or not you were entitled to a peremptory mandamus.

653

Judge Brown: It is an important feature in this case, because under the act of 1871, in carrying out this plan, it is especially provided that they shall not interfere with anybody's else property except what belongs to the City. They were given the power, by the exercise of condemnation, or the power of purchase to acquire individual property. They determined it was necessary, in view of improvements between 39th and 41st Streets, to acquire the property of Mr. Appleby.

The Court: What property did the condemnation proceedings cover?

Judge Brown: Covered all the property from 39th Street north to 41st Street.

654

Mr. Freedman: Excepting the streets and avenues?

Judge Brown: Excepting the streets and avenues.

Mr. Freedman: The proceeding covered the block between 39th and 40th Streets bounded by the sides of the streets and avenues, and between 40th and 41st Streets, bounded by the streets and avenues.

The Court: In other words, you brought a proceeding to condemn all the property that these people had west of Twelfth Avenue?

Mr. Freedman: Yes.

Judge Brown: Everything that is involved in this suit.



The Court: The very property that is involved in this suit. I don't see how the condemnation proceeding had anything to do with this case.

Judge Brown: The condemnation proceeding was begun in 1894, and then two of the commissioners died and it lay in abeyance. Then a motion was made for this peremptory mandamus to compel the City to apply to the Court to have new commissioners appointed. If that proceeding is still pending it may affect the relief that the plaintiffs will get in this case, because we might not get an injunction if the Court determines that they should go on with that proceeding, or compels them to go on with that proceeding. 656

The Court: I don't see that I can do that in this case. I don't see that that question is involved in this case at all. If you are entitled to a peremptory mandamus, you have to make your application for it in the usual way.

Judge Brown: I don't suppose you could exercise the powers that you could on a motion for a peremptory mandamus, but you might frame the injunction so that they should be restrained from using this property unless they proceeded with that condemnation proceeding promptly and condemned the property, because the powers of a Court of Equity in such a case as this are so broad and wide that you could do almost anything. 657

The Court: I suppose if I granted an order of injunction against using this property, then the question of what they would do in the condemnation proceedings would be a different matter.

Mr. Freedman: Quite so.

The Court: I need not anticipate that. I don't know if they have a right to withdraw it or not, but if I enjoin them from using this property as they are now using it, they would either then have to go

on with their condemnation proceedings, or withdraw them, or you would have whatever rights you have in the matter. I don't see that it is necessary to dispose of that now in this proceeding.

Judge Brown: Then we will proceed to put in our proof.

The Court: I suppose the facts are really substantially as stated by Mr. Justice Scott in his opinion, aren't they?

659 Judge Brown: I think not, but I think the facts are substantially admitted as alleged in the complaint. The legal inferences which are drawn from some of the facts are not admitted, but the facts themselves, that is the conveyances, the erection of these piers, the laws, the fact that they have made leases of these piers, and that they are using these slips, and that the City is deriving a large revenue from it—all those facts are not disputed, I think.

660 The Court: Is there any dispute in regard to the laws as laid down by Mr. Justice Scott, that any grant made by the City was subject to the rights of the City or the Federal Government to regulate the use, and that therefore, having regulated it and restricted the use to the bulkhead line of 1871, that beyond that—

Judge Brown: As to the State, yes, we dispute that absolutely.

The Court: Do you dispute the law or the facts?

Judge Brown: The law.

The Court: Not the facts?

Judge Brown: Not the act of the Legislature.

The Court: What is your point on the law?

Judge Brown: It is that, under these conveyances originally made to Appleby in 1852, he acquired a fee to the soil, and of course, the right to fill in and make the land. The grant of the State to the City, and the City's grant to Appleby

were not made for the promotion of commerce, like the grant was made in the Staten Island case, but they were made, as the cases say, for the purpose of extending the land of the City westward. The Legislature could not afterwards, after they had established Thirteenth Avenue and the property had been conveyed to the City, and the City had conveyed it to Appleby—they could not take that away from Appleby except by the exercise of eminent domain. That is, so far as the State is concerned.

662

Mr. Freedman: Coincident with the 1871 line.

Judge Brown: Yes, but they established that line afterward the City had made this plan, and the act of the Secretary of War or Congress could not confer any greater rights on the City than it had before.

The Court: But if, as a matter of fact, that bulk-head line is fixed as the 1871 line and beyond that these plaintiffs are not entitled to fill in and have nothing except the naked fee to the land under water, then this injunction could not issue.

663

Judge Brown: We can fill in with the consent of the Secretary of War.

The Court: Beyond that line?

Judge Brown: Beyond that line. That is the act of Congress.

The Court: You could fill in beyond that line?

Mr. Brown: We could fill in beyond that line with the consent of the Secretary of War.

The Court: But if you have not got it you are not entitled to your injunction.

Judge Brown: But we have got our property rights there.

The Court: But you are not entitled to build out because you have not got the consent of the Sec-

retary of War. That being so, you are not entitled to an injunction.

Judge Brown: But where does the City get the right to use this basin?

The Court: I don't know. I am not going to decide that question. What I have got to decide is whether you are entitled to the exclusive right to it. The City may use it or anybody else.

Judge Brown: As against the City, yes, the exclusive right.

665 The Court: No, as against anybody. For instance, the water is flowing over that land, and boats are plying there, and anybody's boat can go on there to-day.

Judge Brown: I don't think so. Nobody's boat can go on there except the boats of these lessees. They leased the piers, and it is not water that is devoted to public navigation. It is water that by these plans and these piers and the action of the City is devoted to the private interests of the City.

666 The Court: I don't understand that the City undertakes to do anything more than build out piers on the streets, and rent them out, but that does not prevent anybody going in there with a boat over that water. The piers, as I understand it, are on the streets. There is no question about the right to the piers, but your injunction is to restrain boats from going up to those piers. You are asking for an injunction to enjoin anybody—you claim the right to enjoin anybody—from going on the water which is over that land of yours.

Judge Brown: In this suit we claim the right to enjoin the City and lessees, that is all.

The Court: Because they are the people that are using it, but if anybody else used it you would claim the same right against them. In other words,

your claim, as I understand it, is based upon the contention that without your consent, nobody has a right to go in on the water over your land?

Judge Brown: Yes.

The Court: That being so, if the United States Government has appropriated, or regulated, or taken action with regard to so much of the land as is west of the 1871 line, and you have not obtained the consent of the Secretary of War to build out beyond that, you are not entitled to any injunction—that is, you could not enjoin myself or anybody else from going in there in a boat. Therefore, you can't enjoin the City. 668

Judge Brown: It seems to me we can, because there is a manifest difference between the City and anybody else. Under the grant made to Appleby he was to have the right to go out to Thirteenth Avenue, and to have the right to make all these streets. He was to have the right of wharfage on the outside of Thirteenth Avenue, and he had the right to fill in all the land and make it land. That he got from the City by their grant. Then the Act of 1871 came along, and they make this new plan. They move back the bulkhead line to a point 150 feet; instead of permitting him to make these streets they make them themselves and build these piers and deprive him of his right of wharfage and of the easements he would have had if he filled it in in these streets, and they take all those property rights away from him, and that was done when they made the plan and built these wharves and leased the property out. That was a loss direct to Appleby. At a later day, when Appleby's property is destroyed in that way, when they have made these leases and brought in their tenants, Congress passes an act to establish the bulkhead line, under their power of regulation. How does that release 669

the City from their obligation to make good the property that they had appropriated of Appleby? I can't see any legal principle on which it does.

The Court: I have not considered that matter at all, but what is in my mind is this—that the United States Government having established that line, you have no further rights against anybody beyond that line, except the naked fee to the land under water; and that therefore, not having any right to object to the use of the waters, you can't enjoin the  
671 City or anybody else. All the City has done is to build out piers on its own streets, which it had a right to do. By these leases it holds out an inducement to somebody to sail over your land, but if that person has a right to sail over your land, and you have no right to prevent him, what right have you to enjoin the City from using the piers in such a way as will induce these people to do something they have a right to do?

Judge Brown: Is your Honor correct when you say they had a right to build these piers? The  
672 streets as laid out on the map, and as fixed in these conveyances of 39th, 40th and 41st Streets, run to Thirteenth Avenue. There were to be streets by which the owners would have easements, &c. When they adopt this plan they move the westerly end of the streets back from Thirteenth Avenue onto the bulkhead line where it was fixed, and now they don't use them as streets. They are used as private property.

The Court: You are talking now about so much of the property as lies east of the 1871 line?

Judge Brown: They have put a gate up there to exclude everybody.

The Court: You are speaking now of the property that lies east of the 1871 line?

Judge Brown: West of it, where they built these piers.

The Court: The property west of that is beyond the line fixed by the Federal Government, and consequently you have no right in there.

Judge Brown: We had rights in there to begin with, but they were taken away.

The Court: You had a right in there subject to the rights of the Federal Government. The Federal Government having exercised that right, your interest is gone, and if I am right in that, I don't see how you are entitled to an injunction. The Federal Government might come in there and make the City take down the piers, but how can you make them take down their piers in a place where you would not have a right to object if they built piers? If you have a right to make them take down the sheds, you have a right to make them take down the piers. If you are right in your contention that you have a right to enjoin them from making use of that in any other way except as a street, then you can have them enjoined from using it for sheds, or piers, or for any other purpose except as streets.

Judge Brown: They have taken away the right which belongs to us of wharfage on Thirteenth Avenue.

The Court: They have not taken it away because it is the Federal Government that has taken it away.

Judge Brown: They took it away long before the Federal Government did.

The Court: But you are not suing for damages. You are suing for an injunction. It does not make any difference how many wrongs they committed before. The question is, are they committing a continuing wrong now. That is the only question because that is the only ground for an injunction.

Mr. Freedman: There is another question here which goes back of the 1871 line. The State exercised its sovereign powers and established a bulkhead line in 1857.

The Court: I understand that perfectly, but I am adopting Judge Brown's view just for the sake of argument.

Mr. Freedman: But the State also exercised its supreme governmental powers.

677 The Court: He disputes that. He says the State had no power to do so. In other words, he puts that exactly on the basis that Judge Scott intimates it would be if you had already filled in.

Judge Brown: The act of 1871 answers his question, because under that act, the Act of 1857 was undoubtedly repealed, so far as it related to this property here. The plan extended the bulkhead line out 150 feet, and that was taken in with the bulkhead line at 100 feet.

678 Mr. Von Bernuth: With the consent of the Court and the counsel for the parties, I desire that it be stipulated that the defendant, Weehawken Stock Yard Company, be regarded as joining in all the motions, objections, and exceptions of the City of New York.

Judge Brown: We have no objection.

Mr. Moore: I offer in evidence copy of the official map made by George B. Smith, City Surveyor, March 10th, 1837, entitled "Map showing a projected exterior line of the City of New York extending along the Hudson River from Hammond Street to 135th Street.

Mr. Freedman: I don't object on the ground that it is a copy or that the original is not produced, but I object on the ground that under the pleadings it is incompetent, irrelevant and immaterial.



Objection overruled; exception.

Received and marked Plaintiffs' Exhibit 1.

The Court: I am going to take all this testimony and if I think any of it is immaterial, when I come to decide the case, I will exclude it.

Mr. Freedman: May we note a blanket exception, so that wherever an objection is made an exception will follow?

The Court: I don't think it does much good because, after all, I have to decide whether they are material as a part of the evidence in the case, and if I am wrong in giving effect to anything you have a right to review it without an exception. All these questions can be reserved, and you may take them up in your brief. 680

Mr. Moore: I offer in evidence Chapter 115 of the Laws of 1807, at page 280, that act conveying 400 feet into the Hudson River to the City of New York, beyond the low water mark.

Received and considered marked Plaintiffs' Exhibit 2. 681

Mr. Moore: I offer in evidence Chapter 182 of the Laws of 1837, establishing Thirteenth Avenue, and granting the land under water beyond the 400 foot line and out to the westerly side of Thirteenth Avenue to the City of New York, and extending and establishing the intervening streets and avenues in that territory.

Received and considered marked Plaintiffs' Exhibit 3.

Mr. Moore: I offer in evidence grant to Charles E. Appleby, dated August 1st, 1853, from the Mayor, Aldermen and Commonalty of the City of New York, expressing the consideration of \$6369.37

and conveying all the land and premises shown colored pink on the map.

The Court: Are those the deeds under which you claim your title?

Mr. Moore: Yes.

Received and marked Plaintiffs' Exhibit 4.

Mr. Moore: I offer in evidence certified copy of grant by the City of New York, to Robert Latou, made December 4th, 1852, for an express consideration of \$4937.50, conveying all the premises shown on the map annexed colored pink, by metes and bounds description, and with certain covenants and agreements between the different parties.

Mr. Freedman: I object to the statement that it conveys all the premises colored pink, without a statement that there are exceptions and reservations of portions of the premises colored pink. The streets are expressly reserved.

Mr. Moore: Yes.

The Court: I understand that that statement is simply descriptive of the deed. The deed speaks for itself.

Mr. Moore: We concede the streets are excepted in that grant, for uses and purposes of public streets.

Received and marked Plaintiffs' Exhibit 5.

Mr. Moore: I offer in evidence deed of Robert Latou to Charles E. Appleby, dated January 12th, 1854, conveying the same premises which the City conveyed to Latou.

Received and marked Plaintiffs' Exhibit 6.

Mr. Moore: Charles E. Appleby remained the owner of the premises until the date of his death, December 15th, 1913. I offer in evidence the last

*John S. Appleby—By Plaintiffs—Direct*

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will and testament of Charles E. Appleby, dated May 17th, 1905, probated in New Jersey, with certificates attached, and exemplified copy filed in the Surrogates' office of New York County, and also in the County Clerk's of New York County.

Received and marked Plaintiffs' Exhibit 7.

Mr. Moore: I offer in evidence letters testamentary under the last will and testament of Charles E. Appleby to Edgar S. Appleby and John S. Appleby.

686

Received and marked Plaintiffs' Exhibit 8.

JOHN S. APPLEBY, called as a witness in behalf of the plaintiffs, being duly sworn, testifies as follows:

*Direct examination by Mr. Moore:*

Q. Where do you reside? A. Glen Cove, Long Island.

Q. Are you a son of Charles E. Appleby? A. I am. 687

Q. What is you brother's name? A. Edgar S. Appleby.

Q. Did Charles E. Appleby leave any other child or children, or issue of any deceased child or children, other than yourself and your brother? A. He did not.

Q. Did he leave a last will and testament? A. He did.

Q. And that was probated in New Jersey and a copy filed in New York County? A. Yes.

Q. Were you familiar with your father's affairs during his lifetime? A. I was. He occupied the same office with me for a number of years.

688 *John S. Appleby—By Plaintiffs—Direct*

Q. Are you familiar with the premises at 39th and 41st Street, North River, owned by your father?

A. Yes.

Q. Do you know what part of that property that was granted to him by the City of New York had been filled in? A. From low water mark to a line about four feet east of Twelfth Avenue and parallel with Twelfth Avenue.

Q. You mean from the high water mark? A. Yes.

689 Q. Do you recall whether your father had negotiations with the Dock Department of the City of New York relative to the purchase of this property?

Mr. Freedman: Answer Yes or no.

A. Yes, he had.

Q. State what you recollect in reference to those negotiations.

690 Mr. Freedman: I object to that as incompetent, irrelevant and immaterial. This is on the question of negotiations, and the condemnation proceedings are not in issue in this action.

Q. Prior to 1894, and prior to the institution of the second condemnation proceeding.

The Court: Is 1894 the date of the condemnation proceeding?

Mr. Moore: The first condemnation proceeding was begun in 1891, but it included the block above this property which was owned by the Consolidated Gas Company, and on motion of the attorneys for the Consolidated Gas Company at that time the proceeding was discontinued and a new proceeding was begun on the

*John S. Appleby—By Plaintiffs—Direct*

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property of Mr. Appleby alone. In other words, the City had overlooked the fact that he had conveyed this property to the Consolidated Gas Company prior to 1891 so that they discontinued the 1891 proceeding and began a new proceeding in 1894 against the two blocks between 39th and 41st Street.

The Court: How have the negotiations with the City to purchase the property got anything to do with this case?

Mr. Moore: I think it is material in showing the endeavor of the City to carry out the plan of 1871. In other words, the taking of this property is to carry out the plan of 1871, which made this property into slips and basins, and the attempt to purchase it at that time was one step in the line of an effort to carry out the plan of 1871. 692

The Court: You mean the City plan of 1871?

Mr. Moore: Yes.

The Court: You contend in regard to that that the City had no right to take that action at all. 693

Mr. Moore: No.

The Court: You claim, don't you, that the City of New York had no right to establish that 1871 line, and interfere with your rights?

Mr. Moore: The Act itself says that the plan may be established, but it may not be carried into effect until compensation was made by private purchase or condemnation proceedings.

The Court: I mean fixing the bulkhead at that line—in other words, providing that all land west of that line should be land under water and used for navigable purposes. You say they had no right to do that so far as your property was concerned?

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*John S. Appleby—By Plaintiffs—Direct*

Mr. Moore: They don't attempt to do that. They don't attempt to make that land into public navigable waters, but they attempted to make it into private slips and basins.

The Court: I mean they wanted to take it for public uses.

Mr. Moore: For public uses, but in a proprietary capacity.

The Court: How is this negotiation material to this case?

695

Mr. Moore: Just merely to show the history of the case—the steps of the City leading up to acquiring the property for the plan of 1871.

The Court: I don't see how it is material. It is a question of whether they had a right to exclude you from the use of the property beyond that line, without condemning it. I don't see how these negotiations are material.

Mr. Moore: It shows what was in the mind of the City at the time that it was proceeding lawfully prior to 1890 to acquire this property for the purpose of the plan.

696

The Court: I don't think it is material what was in their mind. I will exclude it.

Exception to plaintiffs.

Q. Do you recall the first condemnation proceeding instituted in reference to this property in 1891?

Mr. Freedman: Yes or no.

A. Yes.

Q. Was that proceeding discontinued? A. It was.

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial.

*John S. Appleby—By Plaintiffs—Direct*

697

The Court: How is that material?

Mr. Moore: We claim that the condemnation proceeding is very material for several reasons. One is that the City states in the petition that it is to acquire this property for the purpose of carrying out the plan.

The Court: If you want to introduce some document or some paper signed by the City, as an admission, that is an entirely different question, but you are asking him now whether the proceeding was discontinued. I don't see the materiality. 698

Mr. Moore: That is true. I will put in the papers.

The Court: If you claim there is some admission that is binding on the City, I will pass on that question when it comes up. But that is not this question.

Mr. Moore: It is merely to show the history of the case.

Q. Did your father receive any rents, income or profits from the property between Twelfth and Thirteenth Avenues and 39th and 41st Street during his lifetime? A. He did not. 699

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial.

The Court: He says he did not.

Mr. Freedman: Let it go.

Q. Have you and your brother, individually or as executors, received any rent, income or profits from the property since your father's death? A. No, we have not.

Q. The premises between Twelfth and Thirteenth Avenues, 39th and 41st Streets, are under water?

A. They are.

700 *John S. Appleby—By Plaintiffs—Cross—Redirect*

Q. And they always have been under water so far as you can recollect? A. Yes, although the water has not always been as deep as it is now.

The Court: What?

The Witness: The City has deepened the water in dredging for the basin, but it has always been under water so far as I can recollect.

701 Q. Were the piers in the streets constructed with the consent of your father or of yourself? A. They were not; on the contrary, he objected.

Mr. Freedman: That is enough. I object to any further answer.

Q. When the piers were constructed in the streets, did your father object to the construction thereof? A. Yes.

Q. And did he voice his objections in writing to the Department of Docks of the City of New York? A. Yes, he wrote them.

702 *Cross examination by Mr. Freedman:*

Q. Do you know whether your father, or your brother, or yourself paid taxes on this property? A. The property has been taxed. We have not paid it, not having any use of the property.

*Redirect examination by Mr. Moore:*

Q. You expected that whatever lawful taxes there were upon the property would be deducted from the award in the condemnation proceedings, did you not?

Mr. Freedman: I object to his testifying as to what he expected.

Objection sustained. Exception by Mr. Moore.



*John S. Appleby—By Plaintiffs—Redirect* 703

Q. Is the reason why you never paid any taxes because that you intended that the lawful taxes, whatever they were, should be deducted from the award in the condemnation proceedings?

Mr. Freedman: Objected to as incompetent, irrelevant and immaterial.

The Court: It is utterly immaterial what his reasons were. If he had a legal right to have them deducted from the money awarded in the condemnation proceedings, that would be done whether he intended it or not. His intentions would not have anything to do with it one way or the other. 704

Mr. Moore: I offer in evidence Chapter 137 of the Laws of 1870 establishing the Dock Department of New York.

Received and considered marked Plaintiffs' Exhibit 9.

Mr. Moore: I offer Chapter 574 of the Laws of 1871 re-enacting the establishment of the Dock Department and defining its powers. 705

Received and considered marked Plaintiff's Exhibit 10.

Mr. Moore: I offer in evidence the plan of the Department of Docks known as the plan of 1871, and I read the following from the map: "Department of Docks. Sheet No. 6. North River"; and the following certificate: "We, the Commissioners of the Sinking Fund of the City of New York, hereby certify that the annexed plan for improving the water front and harbor of the City of New York, determined upon and transmitted to us by the Board of the Department of Docks of said City,

*Case*

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was this day adopted by the Commissioners of the Sinking Fund of the City of New York under and pursuant to the provisions of section 6, Chapter 574 of the Laws of 1871; that the territory or district covered and controlled by said plan is as follows: running from the foot of West 32nd Street to the foot of West 46th Street, North River." Dated April 27th, 1871. Signed A. Oakley Hall, Mayor of the City of New York. Colin K. Hackett, Recorder of the City of New York. Richard B. Connolly, Comptroller. John I. Bradley, Chamberlain of the City of New York. Patrick Lysaght, Chairman of the Finance Committee of Board of Asst. Ald. James J. Diamond, Chairman Finance Committee of the Board of Aldermen. Signed by John J. Agnew, Wilson G. Hunt, Richard M. Henry, Henry A. Smith, William Wood, Commissioners.

707

This covers the territory from West 32nd to West 46th Street.

708

Mr. Freedman: I call your attention to the fact that this map or plan shows a pier at the foot of 39th Street and a pier at the foot of 40th Street as in existence in 1871.

The Court: That is the 1871 line, I suppose?

Mr. Freedman: Yes.

Mr. Moore: It shows the proposed bulkhead line and proposed pierhead line in red ink.

The Court: The bulkhead line ran to the line of 1871, and the pier ran out how far?

Mr. Freedman: 500 feet beyond the bulkhead line.

The Court: The same line, I presume, that has been regulated in 1890 by the Secretary of War?

Mr. Freedman: The bulkhead line is the same, and the pierhead line has been changed since then—made longer.

Received and considered marked Plaintiff's Exhibit 11.

Mr. Moore: I offer in evidence amendment to the plan of 1871 which amounts substantially to decreasing the width of the piers 80 feet to 60 feet. It is marked "Tube 93 E.," signed by "G. S. Green, Jr., Engineer in Chief." 710

Mr. Freedman: We admit it is signed by the proper officials.

Mr. Moore: Furnished by the Dock Department.

Received and considered marked Plaintiff's Exhibit 12.

Mr. Moore: I offer in evidence petition in the proceeding, in the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks of the City of New York, relative to acquiring the right, title and possession of the wharf property, rights, terms, easements, emoluments, and privileges of and to the land under water and the lands under water necessary to be taken for improvement of the water front of the City of New York, on the North River, between 39th and 41st Street between Twelfth and Thirteenth Avenues, pursuant to the plan heretofore adopted by the City Department of Docks, and approved by the Commissioners of the Sinking Fund, and also the papers attached to said petition, and the notice for appointment of 711

712

*Case*

Commissioners of Estimate and Assessment, and the map of the property sought to be condemned, with proof of service by advertising.

Mr. Freedman: I object to that as entirely incompetent, immaterial and irrelevant; whether the City began a condemnation proceeding in 1891 or 1860 or 1810 is entirely immaterial in this action.

713

The Court: I understood you to state that there were some admissions in the papers that were relevant.

Mr. Freedman: We don't deny that these plaintiffs own the naked fee of this land.

Mr. Moore: This is an admission of the ownership of the Applebys?

Mr. Freedman: We don't deny that they own the naked fee of this property. We say they own it subject to the regulations of the State and Congress, and it was necessary to acquire what they did own.

714

The Court: What are the admissions in the papers you offer? The existence of condemnation proceedings alone I don't think has anything to do with this case.

Mr. Moore: The third paragraph alleges that all the land under water, tenements, hereditaments, rights, terms and privileges, easements, appurtenances and emoluments, more particularly described in paragraph 2 of the petition were during the negotiations hereinbefore referred to, and still are, owned by Charles E. Appleby.

The Court: That is not denied.

Mr. Freedman: We don't deny that.

Judge Brown: I suppose our deeds are the strongest evidence as to that.

The Court: Of course.

Mr. Moore: This is important, I think, as showing how the City entered into this property under color of a condemnation proceeding. In other words, we did not sit by during these years and permit the City to enter without any recognition of our rights. They entered under condemnation proceedings.

The Court: In other words, you want to set off any claim of laches?

Mr. Moore: Not altogether, but to show the history of this case, without which the case is almost unintelligible. 716

The Court: Immaterial history is not competent.

Mr. Moore: It is not immaterial, because in its answer the City demands that it be declared the owner of this property.

Mr. Freedman: No.

Mr. Moore: It asks that it be declared the owners of these slips and basins.

The Court: All they sought to do was to condemn whatever rights the Applebys had. What rights they had depend upon the deeds. The statement in that paper that the Applebys owned some rights does not add anything to the deeds. I don't see how the City's admission has anything to do with the case. 717

Mr. Moore: Here is another admission in the fourth paragraph: "That the Mayor, Aldermen and Commonalty of the of the City of New York, does not and at the time referred to in the fifth paragraph hereof had not any right or title, nor have they now, nor had they at such times aforesaid, to the land under water, or to any rights, terms, easements and

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privileges pertaining to any of the wharves as herein described."

The Court: They don't claim any title to it.

Mr. Moore: Yes, they claim an easement to float and moor these boats.

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The Court: They simply claim that the State had the right to enter upon those lands and use them as navigable waters. There is no contention here that the City entered through any proprietary rights to the lands, but in the exercise of the right of the State as a public body. You can have the papers marked, and I will reserve my decision on the question of their admissibility. There is no question of laches as I understand.

Mr. Freedman: We have not raised the question of laches in our answer, that I know of.

The Court: I don't see how there could be any question, because if this is a wrong, it is a continuing wrong, and you don't make a continuing wrong right by laches.

720

Mr. Moore: You do if it continues over twenty years. Not in this case, of course. I offer in evidence the petition and accompanying papers on which the order appointing the Commissioners was entered.

Received and marked Plaintiff's Exhibit 13.

Mr. Moore: I offer in evidence the order in the same proceeding appointing the Commissioners of Estimate and Appraisal. It appoints Lawrence Godkin, John T. Farley, and Benjamin Perkins, Commissioners, in said proceeding, and directs them to proceed and make a just and equitable assessment and estimate of the loss and damage to the respective

owners, &c., and to make their report without unnecessary delay.

Received and considered marked Plaintiffs' Exhibit 14.

Mr. Freedman: Your Honor reserves decision as to that, the same as to the other?

The Court: Yes.

Mr. Moore: I offer in evidence the oaths of the commissioners.

Mr. Freedman: I object to that.

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The Court: What these commissioners did, or their oaths, I don't see the materiality of.

Mr. Moore: It might have some materiality on the question of alternative relief.

Mr. Freedman: But there can't be any alternative relief because the Board of Estimate has passed a resolution discontinuing this proceeding, and the Court of Appeals and the various courts have held that that ipso facto discontinues the proceeding.

Mr. Moore: They have held just the contrary.

723

The Court: I will reserve decision on that also. The only question that occurs to me in regard to that is the possibility that I should frame the injunction in such a way as to meet the suggestion made, which does not appeal to me very much now.

Received and marked Plaintiffs' Exhibit 15a.

Mr. Moore: I offer in evidence notice from the Commissioners to Charles E. Appleby that they will hold a hearing when he can present his claim.

Received and marked Plaintiffs' Exhibit 15.

Mr. Moore: I offer in evidence the claim filed with the Commissioners by Charles E. Appleby.

Received and considered marked Plaintiffs' Exhibit 16.

Mr. Moore: I offer in evidence ledger or register from the Bureau of the Commissioners of Estimate and Appraisal in the Dock Department proceeding, page 71, showing the proceedings that were taken under the condemnation proceedings hereinbefore referred to.

Mr. Freedman: Objected to as incompetent, irrelevant and immaterial.

The Court: I don't see how it is competent, but I will let you put it in and reserve decision.

Received and marked Plaintiffs' Exhibit 17.

The Court: You offer all the condemnation proceedings, I suppose?

Mr. Moore: Yes, I offer the condemnation proceedings in evidence.

The Court: And I will reserve decision on it. You may make a general offer.

Mr. Moore: I offer in evidence Resolution of the Board of Estimate and Apportionment discontinuing the condemnation proceeding.

Received and marked Plaintiffs' Exhibit 18.

Mr. Moore: There is no objection on the ground that these are competent copies produced from the Dock Department. I offer in evidence a contract for the construction of a pier in 39th Street.

Mr. Freedman: It is admitted, under the pleadings, that a pier was constructed in 39th



Street. There was an original pier there, and it was extended and widened, and it is not the pier that is affected in this suit. It is entirely within the lines of the street.

The Court: If it is conceded in the pleadings, that settles the matter.

Mr. Freedman: It is admitted in the answer.

Mr. Moore: It is conceded that piers were built at 39th Street, 40th Street and 41st Street, as stated in the complaint.

728

Mr. Freedman: We make the admission as it is admitted in the answer, as to the construction of these piers. I will concede that piers were constructed at——

Mr. Moore: As alleged in the complaint?

Mr. Freedman: No, because there were piers there before.

Mr. Moore: Those piers were taken down.

Mr. Freedman: Not at all. Some of them were extended and some of them were widened, and the inside portions of the present piers are probably the old piers.

729

The Court: You concede that these two piers referred to in that plan and map were built there?

Mr. Freedman: Yes.

Mr. Moore: According to the plan of 1871?

Mr. Freedman: Yes.

The Court: Then there is no use of offering that in evidence.

Mr. Freedman: I withdraw the previous concession. I will admit, so far as the City of New York is concerned, that under and pursuant to authority vested in the City of New York, they constructed, in accordance with the

730

*Case*

plan of 1871, piers at the foot of 39th Street, 40th Street and 41st Street, entirely within the lines of the streets, as shown upon the map and plan and papers.

Mr. Moore: And that the pier in 39th Street was constructed in or about the year 1902.

(Recess until two o'clock.)

731

Mr. Moore: I offer in evidence record of a construction of a platform in West 39th Street, being Bureau Order No. 5326 of the Dock Department. The understanding is that these will be offered and copies will be supplied as far as material.

Mr. Freedman: Where is that platform located?

Mr. Moore: On the 39th Street pier.

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial. It is a platform on the pier within the lines of 39th Street, which are not owned by the plaintiff.

The Court: How is that material?

732

Mr. Moore: It is directly over the premises granted to the plaintiff.

The Court: Is there any issue in regard to the construction there?

Mr. Freedman: Not at all.

Mr. Moore: Yes, that is in issue. It is not in the street. It is out over the water.

Received and considered marked Plaintiffs' Exhibit 19.

Mr. Moore: I understand it is agreed that we may read these offers into the record, and that either party may refer to such parts of the documents as they deem material.

Mr. Freedman: I have no objection to that,

*John S. Appleby—By Plaintiffs—Redirect* 733

but I don't want to be foreclosed from objection on the ground of incompetency or irrelevancy as they are read off. I don't propose to object on the ground that copies are produced instead of the originals.

The Court: Your objection is on the ground of materiality and relevancy. If they are irrelevant or immaterial, I won't consider them.

Mr. Moore: I suppose he takes a general objection?

The Court: Yes, I will allow you a general objection. When I decide the case, if the documents, or any of them, are immaterial, I won't give them any consideration. The construction is not disputed, is it? 734

Mr. Freedman: Not at all. I have never doubted but what the platform was constructed.

By agreement between counsel, with the consent of the Court, a list of exhibits is to be furnished to the stenographer and incorporated in the minutes, subject to the general objection of counsel for the City. 735

Mr. Moore: I suppose that will include all the sounding maps, too.

The Court: Yes.

The following is the list of exhibits subsequently furnished to the stenographer by plaintiffs' counsel, and herewith incorporated in the minutes:

*By Mr. Moore:*

I offer in evidence a sounding map, No. 28.93, being Map No. 28 for the year 1893.

Received in evidence as Plaintiffs' Exhibit No. 20.

Same objection and exception by defendant.

736

*Case*

I offer in evidence Contract No. 660 of the Department of Docks and Ferries which consists of the proposals for estimates for preparing and building a new pier at the foot of West 39th Street, North River, in the Borough of Manhattan. Said proposals to be submitted Monday, July 24th, 1899, at 2 o'clock P. M. The contract and specifications are dated July 25th, 1899, and signed by the proper City officials and the contractor acknowledged August 3rd, 1899. The contract calls for the construction of a pier and pier approach. The pier to be 60 feet wide and 700 feet long and the "pier approach" 40 feet wide, beginning at the easterly side of 12th Avenue.

737

Received in evidence as Plaintiffs' Exhibit No. 21.

Same objection and exception by defendant.

I offer in evidence a report in the Department of Docks showing that the construction of said pier in 39th Street was commenced under Contract No. 660 on August 21, 1899. The work was completed January 3, 1900.

738

Received in evidence as Plaintiffs' Exhibit No. 22.

Same objection and exception by defendant.

I offer in evidence a report of the Commissioners dated July 24th, 1902, showing that the pier approach in West 39th Street was widened to the same width of the pier.

Received in evidence as Plaintiffs' Exhibit No. 23.

Same objection and exception by defendant.

I offer in evidence Bureau Order No. 5326, dated

June 7, 1907, authorizing the "construction and maintenance of a dumping board with necessary runway, scale house, tool house and shelter for workmen" on West 39th Street pier for a distance of 277 feet, "to be used exclusively for dumping manure." On the reverse side is a report from the Engineer dated September 27th, 1907, showing that the "work was begun July 24th and completed September 23rd, 1907."

Received in evidence as Plaintiffs' Exhibit  
No. 24.

740

Same objection and exception by defendant.

I offer in evidence Order of the Dock Department No. 19482, dated September 18, 1899, directing "the dredging in the half slips on either side of the above pier (39th Street) now building, and a report of the Engineer in Chief dated February 2nd, 1900, stating that said dredging was ordered and "work was begun on January 2nd and finished on January 19th, 1900, by Dubois Brothers Dredging Company under Contract No. 662. 25,518 cu. yds. of material were excavated and removed and an average depth of about 15½ feet was made over the area dredged.

741

Received in evidence as Plaintiffs' Exhibit  
No. 25.

Same objection and exception by defendant.

I offer in evidence Contract 231 and specifications dated November 16th, 1886, for the construction of the pier in 40th Street. The specifications called for the removal of the old pier and the construction of a new pier and pier approach, and is entitled, "Work of construction under new plan."

Received in evidence as Plaintiffs' Exhibit  
No. 26.

Same objection and exception by defendant.

*Case*

742

I offer in evidence Bureau Order No. 9971 of the Dock Department in reference to the construction of the shed on the 40th Street pier and an endorsement on the back by the Chief Engineer that the shed had been constructed. "Work begun September 20, 1911, and finished June 21st, 1912." Signed by the Chief Engineer and filed June 28th, 1912.

Received in evidence as Plaintiffs' Exhibit No. 27.

743

Same objection and exception by defendant.

I offer in evidence communication of the Department of Docks showing that the pier in 40th Street was rebuilt and completed December 29th, 1911, and was extended January 17th, 1912.

Received in evidence as Plaintiffs' Exhibit No. 28.

Same objection and exception by defendant.

744

I offer in evidence Dock Department Order No. 14452, dated November 28th, 1894, and the report on said order, which report says, that the "work of dredging in the half slips, adjoining the piers at 40th Street, North River, was commenced on December 6th, 1894, and finished December 31st, 1894, by P. Sanford Ross, Contractor, under Contract 478. 64,992 cu. yds. of material was excavated and removed and a depth of 20 feet of water at mean low water was obtained in the half slips adjoining and approach, dated January 4th, 1895."

Received in evidence as Plaintiffs' Exhibit No. 29.

Same objection and exception by defendant.

I offer in evidence Contract No. 771 of the Dock Department for preparing for and building a new

pier with appurtenances at the foot of West 41st Street, North River, in the Borough of Manhattan, dated July 25th, 1904, acknowledged July 28th, 1904. Work was commenced under this contract July 25th, 1904, and finished November 26th, 1904.

Received in evidence as Plaintiffs' Exhibit No. 30.

Same objection and exception by defendant.

I offer in evidence Bureau Order No. 3035 showing the construction of the shed on the 41st Street pier. Work begun March 16th and finished August 26th, 1905. The report is dated August 30th, 1905.

746

Received in evidence as Plaintiffs' Exhibit No. 31.

Same objection and exception by defendant.

I offer in evidence communication from the Engineer of the Dock Department in reference to the dredging at south side of 41st Street pier, stating that an average depth of 15 feet was made over the area dredged. The communication is dated March 15th, 1905.

747

Received in evidence as Plaintiffs' Exhibit No. 32.

Same objection and exception by defendant.

I offer in evidence Bureau Order No. 10956 authorizing the "erecting of a fence on the pile platform approach to the pier at the foot of West 41st Street \* \* \* fence to remain at the pleasure of the Commissioner of Docks and removed immediately upon receipt of notice from this department at any time calling for such removal. The report of the Engineer says work was begun August 22d and fin-

748

*Case*

ished September 11th, 1912, in reference to said fence, dated September 11th, 1912. Fence erected by Central Railroad Company of New Jersey.

Received in evidence as Plaintiffs' Exhibit No. 33.

Same objection and exception by defendant.

I offer in evidence the following contracts and bureau orders showing the dredging of the plaintiffs' premises at the respective times therein mentioned:—

749

Bureau Order No. 10550, dated March 9th, 1912, dredging the half slip on the northerly side of the 39th Street pier.

Received in evidence as Plaintiffs' Exhibit No. 34.

Same objection and exception by defendant.

Secretary Order No. 17195 for dredging the half slips at 40th Street pier, dated July, 1897. 48,951 cu. yds. of material excavated and removed.

750

Received in evidence as Plaintiffs' Exhibit No. 35.

Same objection and exception by defendant.

Secretary Order No. 19321, dated July 29th, 1899, for dredging the half slip on the southerly side of the 40th Street pier. 20,245 cu. yds. of material excavated and removed.

Received in evidence as Plaintiffs' Exhibit No. 36.

Same objection and exception by defendant.

Bureau Order No. 21009, dated June 20th, 1901, dredging of the slips at the northerly and southerly



sides of the pier in 40th Street. 29,786 cu. yds. of material excavated and removed.

Received in evidence as Plaintiffs' Exhibit No. 37.

Same objection and exception by defendant.

Bureau Order No. 5791, dated December 31, 1907, for dredging both half slips at the pier in 40th Street. 6,169 cu. yds. of material excavated and removed.

Received in evidence as Plaintiffs' Exhibit No. 38.

752

Same objection and exception by defendant.

I offer in evidence Bureau Order No. 2414 for the dredging of the half slip on the southerly side of the pier and approach at the foot of West 40th Street with a report of the Engineer dated July 8th, 1904, that 10,029 cu. yds. of material were excavated and removed.

Received in evidence as Plaintiffs' Exhibit No. 39.

753

Same objection and exception by defendant.

I offer in evidence the Bureau Order No. 17195 showing that dredging in the half slips adjoining the pier at 40th Street, North River, dated July 14th, 1897.

Received in evidence as Plaintiffs' Exhibit No. 40.

Same objection and exception by defendant.

I offer in evidence the Sounding Map at the premises in question for the year 1898 entitled No. 28 N. R.

Received in evidence as Plaintiffs' Exhibit No. 41.

Same objection and exception by defendant.

754

*Case*

I offer in evidence the Sounding Map for the year 1905 at the premises in question entitled No. 28 N. R.

Received in evidence as Plaintiffs' Exhibit No. 42.

Same objection and exception by defendant.

I offer in evidence the Sounding Map for the year 1906 at the premises in question entitled No. 28 N. R.

755

Received in evidence as Plaintiffs' Exhibit No. 43.

Same objection and exception by defendant.

I offer in evidence the Sounding Map for the year 1907 at the premises in question entitled No. 28 N. R.

Received in evidence as Plaintiffs' Exhibit No. 44.

Same objection and exception by defendant.

756

I offer in evidence the Sounding Map for the year 1911 at the premises in question entitled No. 30 N. R.

Received in evidence as Plaintiffs' Exhibit No. 45.

Same objection and exception by defendant.

I offer in evidence the Sounding Map for the year 1914 at the premises in question entitled No. 30 N. R.

Received in evidence as Plaintiffs' Exhibit No. 46.

Same objection and exception by defendant.

I offer in evidence a lease from the City of New York to New York Butchers Dressed Meat Company, dated December 11th, 1914, for a term of years commencing January 1, 1915, and expiring April 1, 1924, leasing all that certain wharf property situated on the North River, Manhattan, New York City, being 300 ft. on the northerly side at the inner end of the pier, foot of West 39th Street. Said lease contains the following clauses, that the said party of the second part covenants and agrees that it will not at any time make any claim for or by way of reduction from rent or otherwise for loss of wharfage or further damage arising from or consequent upon any dredging that the party of the first part may do or cause to be done pursuant to the provisions of this instrument or in consequence of the occupation of said premises by the party of the first part or its agents or contractors for the purpose of doing such dredging.

758

The said party of the second part covenants and agrees that it will at all times remove all obstructions and do such dredging from time to time during the term hereby created as may be necessary in the half slips or basins or water immediately adjacent to said premises.

759

Here take in the clause as to rebuilding of wharves, piers, bulkheads, basins, docks or slips and with reference to Chapter 776 of the Laws of 1911.

The rental for said premises is \$1732.50 for Parcel A and \$1980 for Parcel B per annum, or a total of \$3712.50 per annum for the entire 300 feet.

Received in evidence as Plaintiffs' Exhibit No. 47.

Same objection and exception by defendant.

760

*Case*

- I offer in evidence a lease of the City of New York to the New York Horse Manure Transportation Company dated March 30th, 1912, reciting a previous lease of June 6th, 1907, with the privilege of renewal and leasing 277 feet on the northerly side of the 39th Street pier with the privilege to "maintain a dumping board with the necessary runway, scale house, tool house, and shelter for workmen upon, over and adjoining the wharf property herein demised. The dumping board will be used exclusively for dumping manure." Contains the usual clauses as to dredging the half slips or basins. The lease is duly acknowledged and states that the rental is \$3300 per annum.

Received in evidence as Plaintiffs' Exhibit No. 48.

Same objection and exception by defendant.

- I offer in evidence permit to Burns. Bros. for berth at West 40th Street at a rental of \$1350 per annum, commencing May 1st, 1915, and expiring April 30th, 1916. The description of the wharf property is "berth 100 feet in length on the south side of the approach to the pier, foot of West 40th Street, immediately outshore of the bulkhead. Contains the usual clauses as to dredging and is duly acknowledged.

Received in evidence as Plaintiffs' Exhibit No. 49.

Same objection and exception by defendant.

I offer in evidence permit to the New York Stock Yards Company for a space of 10 ft. x 250 ft. on the north side of the approach to pier, foot of West 40th Street, together with the privilege of maintaining a fence dividing the runway from the "present

approach," with the usual clauses as to dredging, for a rental of \$4200 per annum commencing May 1st, 1915, and expiring April 30th, 1916.

Received in evidence as Plaintiffs' Exhibit  
No. 50.

Same objection and exception by defendant.

I offer in evidence lease of the City of New York to the Central Railroad Company of New Jersey, dated August 17th, 1909, for a term of ten years, of the 700 feet of the pier, foot of West 40th Street, when completed, at a rental of \$18,900 per year. Contains the usual clauses as to dredging the half slips and basins, provides for two renewals of ten years each at an advance of 10% on each renewal. 764

Received in evidence as Plaintiffs' Exhibit  
No. 51.

Same objection and exception by defendant.

I offer in evidence lease of the City of New York to Central Railroad Company of New Jersey, dated April 14th, 1914, reciting a previous lease with the privilege of renewal and leasing the south side of the pier at the foot of West 41st Street, beginning at a line in said pier 795 feet from the outer end and extending inshore for a distance of 158 feet to the easterly end of said pier at a rental of \$2,195.38 per year for a term of ten years, expiring November 28th, 1924, with the privilege of renewal. The lease contains the usual clauses as to dredging "in the half basins or slips" and also the usual paragraph as to Chapter 776 of the Laws of 1911 and a further clause that if the northerly side of said pier should be made available for wharfage purposes, 765

766

*Case*

that it will be rented to the party of the second part.

Received in evidence as Plaintiffs' Exhibit No. 52.

Same objection and exception by defendant.

767

I offer in evidence lease of the City of New York to Central Railroad Company of New Jersey, dated August 19th, 1914, reciting a previous lease with privilege of renewal and leasing for a period of ten years from November 28th, 1914, all the wharfage from 95 feet on the southerly side of the 41st Street pier, including the use of the entire surface of the pier, subject, however, to all of the rights of the Consolidated Gas Company by virtue of an agreement made December 9, 1903, between said Company and the City of New York. The lease contains the usual covenants as to dredging in the half basins or slips and states a rental of \$1320 per annum.

Received in evidence as Plaintiffs' Exhibit No. 53.

768

Same objection and exception by defendant.

I offer in evidence an agreement made December 9, 1903, between the Consolidated Gas Company and the City of New York in reference to an injunction restraining the City and all persons acting under its authority from building a pier at the foot of West 41st Street, North River, and also providing for a lease of a dumping board on the south side of West 41st Street between the existing bulkhead and the bulkhead line as now established by the War Department and on the south side of the proposed new pier at the foot of West 41st Street with further access over the adjoining land under water

and with dredging at the expense of the City. The dumping board lease to continue for five years.

Received in evidence as Plaintiffs' Exhibit  
No. 54.

Same objection and exception by defendant.

I offer in evidence lease of the City of New York to Eben E. Olcott, dated June 18th, 1914, reciting a previous lease, dated December 30th, 1903, which contained a privilege of renewal and that this lease is in renewal thereof for a term of ten years from November 28th, 1914, of the wharf property at the North River, being the south side, outer end and entire surface of the pier at the foot of West 41st Street, 700 feet in length and 60 feet in width, with the right to run spring lines for a distance of 75 feet on the north side of said pier, at a rental of \$13200 per annum. The lease contains the usual clauses as wharfage from vessels, and as to dredging. It gives the lessee the right to construct a shed on said pier and the City covenants that it will furnish the right of way to said pier from 42nd Street over the property of the Consolidated Gas Company, pursuant to an agreement of December 9, 1903.

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Received in evidence as Plaintiffs' Exhibit  
No. 55.

Same objection and exception by defendant.

I offer in evidence the rent rolls and reports of the Dock Department of the City of New York for the years 1890 to 1914, inclusive.

Received in evidence as Plaintiffs' Exhibit  
Nos. 56 to 80.

Same objection and exception by defendant.  
I offer in evidence claim filed by plaintiffs with

772

*Case*

the Comptroller of the City of New York before the commencement of this action.

Received in evidence as Plaintiffs' Exhibit No. 81.

Same objection and exception by defendant.

## PLAINTIFF'S EXHIBITS IN REBUTTAL.

773 I offer in evidence Dock Department Order No. 15743, dated December 6th, 1895, which orders "that the pier or rather what remains of the pier, being old piles, be removed," and the report of the Superintendent of Repairs dated January 20, 1896, stating that "in obedience to the within order the remaining piles, etc., of the old pier at 39th Street, North River, were removed by the Department's force. Begun December 12th, 1895, finished January 17th, 1896."

Received in evidence as Plaintiffs' Exhibit No. 82.

Same objection and exception by defendant.

774

I offer in evidence a letter from the Department of Docks to Charles E. Appleby, dated November 20th, 1890, ordering said Appleby as owner of the bulkhead and water rights between West 40th and West 41st Streets, North River, and the upland easterly thereof, to dredge the slip between West 40th and West 41st Streets, North River.

Received in evidence as Plaintiffs' Exhibit No. 83.

Same objection and exception by defendant.

I offer in evidence a letter from Charles E. Appleby to the Department of Docks in reply to aforesaid letter and dated November 24th, 1890, in which he



calls attention of the department to his grant out to the westerly side of 13th Avenue "and that the only reservation of the City contained in said grants is of the wharfage and crannage to arise from the end of the street beyond the 13th Avenue, and I claim that your present pier inside of the 13th Avenue is there in violation of my rights."

Received in evidence as Plaintiffs' Exhibit No. 84.

Same objection and exception by defendant. 776

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IT IS CONCEDED that the foregoing documents, instruments, orders, records and communications are public documents properly produced by the Department of Docks of the City of New York under subpoena and that the original papers are not marked, but copies thereof, so far as necessary, shall be furnished to the Court and that no objection is made as to the competency of said exhibits on the ground that they are copies, but they are received subject to correction, if any. The exhibits need not be copied in full for the Court, but either party may refer to such portions thereof as they think are material. 777

IT IS STIPULATED AND CONSENTED that proof of past damage from the alleged trespass of the defendants need not be offered at the present time and until the Court renders its opinion on the merits of this action, and that no rights will be prejudiced thereby, and that in the event of a decision in favor of the plaintiffs, said trial may be resumed or referred to a referee for such purpose and that said evidence may be offered with all the rights which the parties would have to offer it at the present time.

778

*Case*

The decision shall not be signed until this evidence has been heard and passed upon, and reference thereto shall be made in the decision and judgment. But proposed findings may be submitted now or after the aforesaid evidence is taken.

Mr. Freedman: I offer in evidence the following resolutions, as Defendants' Exhibits G1 to G4, inclusive:

## APPROVED PAPERS

779

(Vol. 6, p. 488)

"RESOLVED, That the pier at the foot of Fortieth Street, North River, be extended four hundred feet beyond its present terminus, and that the Street Commissioner be, and is hereby directed to advertise for proposals therefor, and return the contract to the Common Council for confirmation."

Adopted by the Board of Aldermen, Dec. 22, 1858. Adopted by the Board of Councilmen, Dec. 27, 1858. Approved by the Mayor, Jan. 8, 1859.

780

Mr. Moore: Objected to as not within the issues, and lacking in proof that the resolution was ever complied with, and also immaterial, irrelevant and incompetent.

By the Court: Decision reserved.

Exception by Mr. Moore.

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(Vol. 35, p. 218)

"RESOLVED, That the pier at the foot of Fortieth Street, North River, be rebuilt; the same to be done under the direction of the Street Commissioner."

Adopted by the Board of Aldermen, Dec. 23, 1867. Adopted by the Board of Councilmen, Jan. 6, 1868. Approved by the Mayor, January 6, 1868.

Same objection, ruling and exception.

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RESOLUTION AS TO PIER AT 39TH STREET.

Vol. 18, p. 196—approved papers.

RESOLVED, that a water-grant at the foot of Thirty-ninth Street, North River, be given to James N. Cobb, provided that he shall build at his own expense a good and substantial pier at the foot of the said street, under the direction of the Street Commissioner, the same to be completed in one year.

782

Adopted by the Board of Aldermen, June 3, 1850. Adopted by the Board of Assistants, June 8, 1850. Approved by the Mayor, June 15, 1850.

Same objection, ruling and exception.

783

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RESOLUTION OF COMMON COUNCIL APPROVED PROCEEDINGS.

Vol. 20, p. 235.

RESOLVED, that the Street Commissioner be, and is hereby directed to cause to be built a spile pier, of one hundred feet in length, at the foot of Fortieth Street, North River, the same to be used exclusively by the boats that carry offal from the city.

Adopted by the Board of Aldermen, May 10, 1852. Adopted by the Board of Assistants, May 13, 1852. Approved by the Mayor, May 14, 1852.

Same objection, ruling and exception.

784 *Tunis B. Haring—By Plaintiffs—Direct—Cross*

TUNIS B. HARING, called as a witness in behalf of the plaintiff, being duly sworn, testifies as follows:

*Direct examination by Mr. Moore:*

Q. What is your profession? A. City Surveyor.

Q. How long have you been such surveyor? A. Twenty-two years.

Q. In what office? A. Francis W. Ford's Sons.

785 Q. Did you, at the request of the attorney for the plaintiff, on or about August 11th, 1914, prepare a survey of the premises at Twelfth and Thirteenth Avenues, 39th and 41st Streets, Manhattan? A. I did.

Q. Did you prepare field notes and measurements and other information concerning the premises in question for the purpose of making the survey? A. I did.

786 Q. I show you a survey entitled "New York, August 11th, 1914. Surveyed by Francis W. Ford's Sons, City Surveyors, No. 8 James Street, and ask you if this survey was prepared by you. A. That is the survey.

Q. Did you check up your field notes and measurements at the time the survey was prepared? A. Yes.

Q. And is it correct? A. It is.

Mr. Moore: I offer the survey in evidence.

*Preliminary cross examination by Mr. Freedman:*

Q. Does the survey include the lines of Thirteenth Avenue? A. Yes.

Q. Have you got any field notes as to that? A. The position of the side—

Q. I did not ask you that question. I asked you whether you have any field notes as to the

*Tunis B. Haring—By Plaintiffs—Redirect* 787

location of Thirteenth Avenue as shown on this map? A. No field notes to make.

Q. Where did you get them from? A. From the record line of Thirteenth Avenue.

Q. Then so far as Thirteenth Avenue is concerned, this is not a survey as made by you? A. There are lots of things on the property that are not a survey. There is nothing tangible on the ground to survey.

Q. In other words, it is a compiled map? A. There are compilations on that survey, yes. 788

Q. And your line of Thirteenth Avenue is taken from the Smith map of 1837? A. Yes.

Q. Together with the other lines as to Twelfth Avenue and the extensions of the streets? A. Yes.

Mr. Freedman: No objection.

Received and marked Plaintiffs' Exhibit No. 85.

*Redirect examination by Mr. Moore:*

Q. The line of 400 feet represents the line of the water grant of the City of New York in 1807? 789  
A. Yes.

Mr. Moore: I offer in evidence six photographs of the premises in question. They are marked on the back by the photographer.

Six photographs received and marked respectively, Plaintiffs' Exhibits 86, 87, 88, 89, 90 and 91.

790 *Joseph W. Rice—By Plaintiffs—Direct*

JOSEPH W. RICE, called as a witness in behalf of the plaintiffs, being duly sworn, testifies as follows:

*Direct examination by Mr. Moore:*

Q. Where are you employed? A. Pier 81 North River.

Q. Whom are you employed by? A. Central Railroad of New Jersey.

791 Q. Pier 81 is at the foot of 41st Street? A. Foot of West 41st Street.

Q. How long have you been employed there? A. Nine years.

Q. Were you there when the gates were built across West 41st Street—gates and fence across West 41st Street? A. Yes.

Q. Where is that fence and gate?

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial.

The Court: You mean the gates that are there now?

792 Mr. Moore: That is important on the 150 foot line—whether it is one side of the bulk-head line or not.

The Court: If it is material on that, I will take it.

A. Yes, I was there.

The Court: Fence and gate on what pier?

The Witness: 41st Street.

The Court: When was it built?

The Witness: About three years ago.

Q. Who was that built by, do you know? A. I could not say.

The Court: That does not show whether it was on the line or not. I don't see how it is material when it was built.

*Joseph W. Rice—By Plaintiffs—Direct*

793

Mr. Moore: That is east of Twelfth Avenue. The gates are right at Twelfth Avenue.

The Court: Let him testify to that. That is material on the point that Mr. Brown raised. When it was built is not material that I can see.

Q. These gates are just east of Twelfth Avenue, aren't they?

Mr. Freedman: I object to the form of the question. Let the witness state where they are. 794

Objection sustained.

Q. Where were they located?

The Court: Where is that gate and fence, if you know?

The Witness: About the street abutment—about the end of the street.

*By the Court:*

Q. What street? A. 41st Street.

Q. End of 41st Street? A. Yes.

795

*By Mr. Moore:*

Q. Where is the end of 41st Street? A. West 41st Street at the end—right next to the pier line.

Q. How far from Twelfth Avenue? A. That I could not just say.

The Court: There can't be any dispute about it.

Mr. Moore: No, it is shown on the survey.

The Court: Why waste any time about it?

Mr. Moore: Is it agreed that that gate is at the line that is marked on this map "fence"?

Mr. Fredman: I don't know. I assume, as your survey shows, it is there. Your survey shows it.

796 *Joseph W. Rice—By Plaintiffs—Direct*

Q. Are those gates locked at night? A. Yes.

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial.

The Court: I don't see what that has got to do with it.

Mr. Moore: They have got no more right to lock gates across 41st Street—

The Court: You mean they have no right to have them there at all?

797 Mr. Moore: Certainly.

The Court: Then it does not make any difference whether they are locked or not.

Q. What is that part of the pier between the gates and where the shed begins used for by the Central Railroad of New Jersey? A. For a driveway and the landing of a float.

Q. Where is this float landed? A. On the south side of the pier.

The Court: The floats are landed on the south side of the pier?

798 The Witness: Yes.

Q. And are goods carried from the floats on to the pier, and off of the pier on to the floats? A. They are taken off the floats and run in under the shed—pier 81 shed.

Q. How many floats use this slip or basin next to the pier in a day?

Mr. Freedman: Objected to as immaterial whether it is one or a hundred.

Objection overruled; exception.

A. One float a day.

Q. And it remains there? A. It comes in about seven o'clock in the morning and leaves about 7:30 or eight o'clock at night.



*Thomas K. Mahlon—By Plaintiffs—Direct* 799

THOMAS K. MAHLON, called as a witness in behalf of the plaintiffs, being duly sworn, testifies as follows:

*Direct examination by Mr. Moore:*

Q. Where are you employed? A. Employed in the office of Banton Moore, No. 1 Liberty Street.

Q. Did you, at the request of the attorney for the plaintiff, examine the premises at West 41st Street? A. I have.

Q. Will you state the result of your examination of the premises in reference to the use of the pier there and the slips and basins adjoining? A. The pier is covered with a shed. The shed is used for freight storage purposes. The approach to the pier, which leads from the bulkhead or the line of solid fill at the present time, to the shed, is used for the purpose of storing freight as it is unloaded from the barges which moor at the side of the approach, and used for the purpose of storing freight before it is loaded on the barges, and at various times when I visited the premises I found vast quantities of freight stored there. The basin between piers 79 and 80 is usually blocked up with coal barges owned by Burns Brothers and other people. 800

Q. What street is pier 80? A. Pier 80 is 40th Street; pier 81 is 41st Street. 801

Q. And 79 is 39th Street? A. 79 is 39th Street.

Q. Is the shed on 41st Street constructed with doors on the sides into the slips and basins—opening into the slips and basins? A. Yes.

Q. And do ships moor for a long period of time in the slips and basins adjoining the pier in 41st Street? A. Yes.

Mr. Freedman: Objected to. ' This witness was not up there during the whole length of time that any ship was moored there.

The Court: He can only say what he saw.

802 *Thomas K. Mahlon—By Plaintiffs—Direct*

I don't know what you mean by a long length of time, whether it is a day or a month or a year. He can state just what he saw.

803 Q. State what you saw in reference to the slip south of 41st Street pier, confining yourself to the district inside of Thirteenth Avenue. A large floats containing box cars would moor side the pier. They would open the door of the pier—of the shed—and through these doors they would load freight on the box cars. The large float would usually contain eight or ten box cars.

Q. The pier in 41st Street covers the entire width of 41st Street within the extended lines of said street?

Mr. Freedman: That has been alleged in the complaint and admitted in the answer.

The Court: Why go into it if it is admitted?

A. Yes.

804 The Court: I don't suppose it is important to know the exact dimensions or the size of these piers or sheds, or whatever they are. The general fact is that they are there, and they are just used as you say they are.

Mr. Moore: Our purpose is to show that they are coincident with the street lines, so that when a boat is moored next to that pier it can't help but cover and be right over the land owned by the plaintiff.

The Court: I don't suppose there is any dispute about that.

Mr. Freedman: There is not. The defendant admits it.

The Court: They concede it.

Mr. Moore: If it is conceded that the boats moor over the plaintiffs' premises, of course, I don't care to prove it.

*Thomas K. Mahlon—By Plaintiffs—Direct* 805

The Court: That settles it.

Mr. Freedman: We concede that they used the water over the land under water claimed to be owned by you. That is conceded in the answer.

Q. State what is constructed upon the 40th Street pier.

The Court: Does not the photograph show that, and does not the survey show it?

Mr. Moore: If they will admit that these runways extend out over on to the street, that is the point we want to prove. 806

Mr. Freedman: The runways run through the middle of the street. They don't extend beyond the street.

Mr. Moors: Yes, they do.

The Court: The survey shows it, doesn't it?

Mr. Freedman: It is apparently within the lines of the street.

Mr. Moore: If the facts shown on the survey are admitted I don't care to prove it by this witness. 807

Mr. Freedman: We don't admit anything on the survey. You have put your survey in evidence, and the facts that are shown on it you are entitled to discuss.

Q. You have examined the premises and have visited them frequently between Twelfth and Thirteenth Avenues, 39th and 41st Streets? A. Yes.

Q. And have observed boats in the slips and basins there? A. Yes.

Q. State whether or not you have observed that these boats continually or frequently fill up the slips or basin so that access to the upland is prac-

808 *Thomas K. Mahlon—By Plaintiffs—Direct*

tically or substantially or entirely prevented? State what you observed in regard to that.

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial.

Objection overruled.

A. The basin between 39th and 40th Street is usually—in fact, every time I ever visited the premises—was filled with Burns Brothers' coal barges, and nothing could get through. The entire space  
809 was completely filled. With regard to the other basin between 41st and 40th Street, there is usually one of the Hudson River Day Line boats lying at the end of pier 81, and the Central Railroad of New Jersey's flat boats lie alongside of the pier, with box cars on them, and very frequently extend to the cattle runway. At the pier in 40th Street is a cattle boat.

Q. What is the width of these floats that carry these railroad cars that lie there, do you know?

A. Two box cars, if I remember correctly, are placed one side the other.  
810

Q. Two tracks on each float? A. Yes. As a general rule the floats have ten cars on them.

Q. That is ten on each track? A. No, five on each track.

Q. And they occupy both sides of the slip between 40th and 41st Street—the Central Railroad of New Jersey? A. The Central Railroad of New Jersey flat boats, I observed mostly south of the pier on 41st Street.

Q. What occupied the north side of the 40th Street pier? A. The Central Railroad of New Jersey has that, but if I remember correctly, they have all the gates closed on the north side. They have all the doors closed on the north side of pier 80 in 40th Street, and freight is piled up against the doors.

*Thomas K. Mahlon—By Plaintiffs—Cross*

811

Q. Where does the ferry-boat moor? A. I remember a ferry-boat coming in there and seeing one in there. It is in the basin but I don't know exactly.

Q. It is shown in the photograph. At all the times that you have visited this property, has it been occupied by some of the defendants to this action? A. Yes.

Q. And you have never seen anyone else in those slips and basin other than the defendants in this action? A. Not to my knowledge, no.

812

*Cross examination by Mr. Freedman:*

Q. Burns Brothers is the lessee of the Appleby bulkheads between 39th and 40th and 41st and 42nd Street, is it? A. I am not acquainted with that.

Q. Isn't it a fact? A. I don't know.

Q. How long a time did you ever spend up at one of these places—half an hour or five minutes? A. No.

Q. Half a day? A. Two or three hours each time I went there.

813

Q. You don't know whether any of these boats were ever taken out and got back by the next time you were there? A. The boats would always be full of coal, and I never saw them move while I was up there. I imagine they did. They must have, but I did not see them move.

Q. Don't Burns Brothers deliver their coal over the Appleby bulkhead? A. I never treated that phase of the case.

Mr. Moore: We have got the leases and permits of the slips and basins which will be offered in evidence under this agreement.

The Court: You can put them all in.

PLAINTIFFS REST.

814

*Motion to Dismiss*

Mr. Freedman: I can't make a concession as to the 150 feet, for the reason, in the first place, that in the grants under which these parties claim, the grantee covenants for himself, his heirs and executors not to make the land nor the streets without the permission of the City of New York.

Mr. Brown: That we dispute. As to the streets, but not as to our own land.

815

The Court: You don't concede it?

Mr. Freedman: We don't concede it. Furthermore, the Court of Appeals says we have a right to use as it is actually made and built.

I move to dismiss the complaint on the ground that there are no facts sufficient to constitute a cause of action against the City of New York shown on the trial.

Decision reserved.

816

Mr. Freedman: I offer in evidence Buckhout map of 1860 produced from the Department of Highways. It is a map showing the piers. It is for the purpose of showing piers at the foot of 39th and 40th Streets in 1860.

Mr. Moore: Objected to on the ground that it is eight years after our grant.

Mr. Freedman: They themselves have shown that the piers were there in 1871, and the piers are there today, or extensions of them, or rebuildings of them. I propose to show that by resolution of the Common Council they were built in 1852.

Mr. Moore: Objected to as immaterial and irrelevant, not binding on the plaintiffs.

The Court: I will allow it as part of the evidence going to show that the piers were there in 1852. That is what you want to show.

Mr. Moore: 1860.

The Court: He says he is going to show they were there in 1852.

Received and marked Defendants' Exhibit A.

Mr. Freedman: I offer in evidence Harbor Commissioners' map confirmed by Chapter 763 of the Laws of 1857, fixing a bulkhead and pierhead line in this locality.

The Court: That is the map referred to in that statute?

818

Mr. Freedman: Yes.

Mr. Moore: Objected to as irrelevant and immaterial, and that, so far as it relates to this property, it is repealed by the act of 1871.

The Court: I will allow it in evidence so that I will have it before me. I will pass upon the question as to its materiality later.

Mr. Freedman: We will have a copy of it made.

The Court: Doesn't the act of 1857 fix the bulkhead 100 feet west—

819

The Court: This is the map which is referred to in the act of the Legislature?

Mr. Freedman: Yes.

Mr. Moore: The line is 100 feet west of Twelfth Avenue. The act of 1871 made it 150 feet.

Mr. Freedman: Yes, gave you 50 feet more than you had before. I offer in evidence the description of the line as furnished by the Commissioners under the act of the Legislature and confirmed by the act of 1857.

Mr. Moore: Same objection.

Same ruling; exception.

Received and considered marked Defendants' Exhibit B.

820 *Emil A. Nordstrom—By Defts.—Direct—Cross*

Mr. Freedman: I also call your Honor's attention to the fact that the piers at 39th and 40th Streets are also on this 1857 map.

Mr. Moore: But they are in a different location from 1860.

Mr. Freedman: We will furnish a copy of this.

Mr. Moore: Objected to as immaterial, irrelevant, and not proof of the facts that are depicted upon it.

821 Decision reserved.

EMIL A. NORDSTROM, called as a witness in behalf of the defendants, being duly sworn, testifies as follows:

*Direct examination by Mr. Freedman:*

Q. What is your profession? A. Civil engineer.

Q. Where are you employed? A. Department of Docks and Ferries.

822 Q. Kindly look at that map and tell me where it comes from (handing witness map). A. That is a copy of the map of the Secretary of War, establishing the harbor line around the Borough of Manhattan.

Q. Where did you procure that from? A. It came from the Department of Docks and Ferries as being submitted by the Secretary of War as an official document.

Mr. Freedman: I offer that map in evidence.

Mr. Moore: I object to it as incompetent, irrelevant and not properly proven.

*Preliminary cross examination by Mr. Moore:*

Q. What do you know about its coming from the Secretary of War, from your own knowledge? A.



*Emil A. Nordstrom—By Defendants—Cross*

823

It is signed by the Secretary of War and was sent by the War Department to the Department of—

Q. How do you know it was—did somebody tell you it had been? A. I know it because I have seen the same copies in the Secretary of War's office as being similar and exact copies of the same copy that is there.

Q. But you did not have any part personally in either sending it or receiving it, did you? A. I did not.

Q. This is a map that you know is in the office of the Department of Docks and Ferries? A. Yes.

824

Q. And you assume what is on the face of it is true, and that is all you know about it, isn't it? A. And I also know that it is accepted by the Department of Docks and Ferries as an official document.

Mr. Moore: I move to strike that statement out.

The Court: On the ground that it is not responsive, I suppose?

Mr. Moore: Yes.

825

The Court: I don't think it is responsive to the question. There can't be any dispute about it. It is a map, isn't it, by the Secretary of War?

Mr. Moore: I suppose so. I have never seen it.

Mr. Freedman: This is the official map furnished to the city authorities, and it has got the autograph signatures on it.

The Court: I don't suppose the map proves itself.

Mr. Freedman: I suppose I can get someone to prove Mr. Sanger's signature as Assistant Secretary of War, and the signatures of the various engineers here. I have raised no question as to his maps not being the originals.

826

*Emil A. Nordstrom—By Defendants—Cross*

I can get a certified copy from the Secretary of War before the case is submitted.

Mr. Moore: We will admit that the Secretary of War has fixed the bulkhead line 150 feet west of—

The Court: Do you admit that is the map? I suppose he has fixed the bulkhead line by reason of filing a map.

827

Mr. Freedman: He has fixed a description which is furnished to this gentleman by the Army engineers in the Army Building, and this map is the result of that description.

The Court: There is not any question about it, is there, that the Secretary of War did fix this line?

Mr. Moore: I was going to admit, when I was interrupted, that he has fixed a bulkhead line 150 feet west of Twelfth Avenue, and fixed a pierhead line—how far out is the pierhead line?

Mr. Freedman: I don't know.

828

Mr. Moore: We will admit both the bulkhead line and the pierhead line when we find out where the pierhead line is.

The Witness: The pierhead line is 700 feet out shore of the present bulkhead line.

Q. The bulkhead line is 150 feet west of the west side of Twelfth Avenue? A. Yes.

Q. And the pierhead line is 700 feet west of the bulkhead line? A. Yes.

Mr. Moore: We admit that.

*By Mr. Freedman:*

Q. (Handing witness paper.) I ask you to look at this white print, and ask you to please state to the Court what it is. A. This is a map which

*Emil A. Nordstrom—By Defendants—Cross*

829

shows the existing conditions between 39th and 41st Street as taken from the official surveys of the Department of Docks and Ferries, and has shown on there certain lines and information which have been taken from official documents, such as pierhead and bulkhead lines, water grants and the construction of piers, and the date of such construction and the completion of such construction, and also piers which existed as they existed at the various dates, such as taken from the Buckhout map in 1860.

830

Q. Did you prepare that map yourself? A. I did.

Q. And did you compare all the lines which you took with the original maps on file in the various departments? A. I did.

Q. And those lines shown on those original maps are correctly represented on that map? A. They are.

Mr. Freedman: I offer that map in evidence.

Mr. Moore: I object to the map as immaterial, irrelevant and incompetent.

831

The Court: I will allow it subject to correction if it is not correct.

Mr. Moore: Exception.

Mr. Moore: There are two or three corrections.

The Witness: There is one correction I would like to explain.

The Court: Explain it.

The Witness: The one correction I wish to make is, that I have shown the water grant as running from the side of the street to the side of the street, whereas the water grant ran from the middle of the street to the middle of the street.

832      *Emil A. Nordstrom—By Defendants—Cross*  
*By the Court:*

Q. What do you mean by the water grant? What grant do you mean? A. The original water grant. There was a water grant to Charles E. Appleby on August 1st, 1853. It ran from the center line of 39th Street to the center line of 40th Street, but the spaces between the streets are exempted from that water grant, so I show in effect the water grant as running between the streets so as not to confuse the other information which is shown within the lines of the street. The effect of the water grant is shown instead of—

833

Q. You call the water grant the deed under which the Applebys claim? A. Yes.

The Court: It is a deed in fee, as I understand.

Received and marked Defendants' Exhibit D.

*Cross examination by Mr. Moore:*

834      Q. What map did you use as the base or basis for preparing this map? A. The survey sheets of the Department of Docks and Ferries.

Q. That one known as Sheet No. 12, isn't it, of the Department of Docks? A. I believe it is, from my recollection, Sheet No. 12 on the North River.

Q. Do you remember whether Sheet No. 12 had the slips and basin of this pier marked off as rented to certain corporations? A. I could not say.

Q. You don't remember whether the Sheet No. 12 had that on it or not, do you? A. No.

Q. If it did have that on it, then you erased it before you prepared this compiled map, did you, or you left that off?

The Court: I don't suppose he erased anything from the original map.

*Emil A. Nordstrom—By Defendants—Cross* 835

A. I did not erase anything to the best of my recollection.

Q. This map does not show the slips and basin between the piers as rented to any private corporation, does it? A. Not as I remember it, no.

Q. Yet Sheet No. 12, which is the basis of the preparation of this map, does show that, doesn't it? A. May I ask you just which Sheet No. 12 you refer to—a survey sheet or a standard map?

Q. Sheet marked 12 (handing witness sheet). A. This is the map from which this composite map was compiled (indicating Defendants' Exhibit D). 836

Q. What do you call that map in the Dock Department? A. It is known as a standard tracing.

Q. And it is the basis of your composite map? A. Yes.

Q. On this map there is written across the slip and basin north of the pier in 39th Street these words, "Leased to New York Butchers Dressed Beef Company. Expires April 1st, 1924," isn't there? A. If I remember that correctly—

Q. Answer the question. A. I believe there is. It is in there in pencil, is it not? 837

Q. I will ask you whether it is in there in pencil or ink. A. That is in there in ink.

Q. When you prepared this compiled map you left that off of the compiled map, didn't you? A. Not that I remember, no.

Q. You can't point it out on the compiled map, can you? A. No, it is not on there.

Q. On the south side of 40th Street pier there was a slip and basin marked "Permit for 100 feet to Burns Brothers. Expires April 30th, 1915"? A. Yes.

Q. That was not on your compiled map? A. It is not.

838 *Emil A. Nordstrom—By Defendants—Redirect*

Q. On the north side of the pier in 40th Street—in the slip and basin on the north side of the pier—there were these words, "Permit for space 10 by 250 to New York Stock Yards Company and Weehawken Stock Yard Company. Expires April 30th, 1915." That is not on your compiled map, is it? A. I presume not.

Q. You have shown on this compiled map some black lines indicating a pier as shown on the Buckhout map of February, 1860, in 39th Street, is that  
839 right? A. Yes.

Q. Do you know when that pier was torn down? A. I do not.

Q. How long have you been in the Dock Department? A. A little over nine years.

Q. Don't you know that that pier was town down about 1899? A. I do not. I would have no means of knowing when the pier was torn down.

Q. Of course, you don't know when the pier in 40th Street was torn down? A. I do not.

Q. That is the pier that you have shown here as represented on the Buckhout map? A. I could  
840 not tell you.

*Redirect examination by Mr. Freedman:*

Q. Do you know whether those references apply only to the pier as to the occupation and matters Mr. Moore has just called your attention to?

Mr. Moore: Objected to.

The Court: He can answer yes or no.

Mr. Moore: The map speaks for itself and it is the best evidence, and of course we all know that you can't have a pier without a slip and a basin, so what it applies to is of course the pier and the basin. It can't apply to one without the other because the pier could not be used without the slip and basin.

*Emil A. Nordstrom—By Defendants—Recross* 841

Mr. Freedman: There is no lease or permit to occupy the slip.

The Court: The permits are the best evidence. They are in evidence.

*Recross examination by Mr. Moore:*

Q. This map also shows the slip and basin between 41st and 42d Street, does it not? A. Yes.

Q. Do you know whether that is owned by the Consolidated Gas Company, or not?

Mr. Freedman: Objected to.

842

The Court: I don't think it is important who owns the pier north.

Mr. Moore: It is a foundation for one point I want to prove on the map.

The Court: How is it material to this issue?

Mr. Moore: The next question will show.

The Court: What is the next question?

Q. Do you know whether the Consolidated Gas Company obtained an injunction against the construction of the pier in 41st Street—injunction against the City of New York?

843

Mr. Freedman: Objected to as entirely incompetent, irrelevant and immaterial.

The Court: What has that got to do with it whether they got an injunction against the City of New York or not?

Mr. Moore: The other pier there in 41st Street was enjoined by the Consolidated Gas Company who owned the same rights in the block above that we own here.

The Court: If you think that is an authority in this case you can call my attention to the decision.

Mr. Moore: That is the reason I want to make the reference to it now.

The Court: The decision will speak for itself.

Mr. Freedman: I offer in evidence judgment roll in the action brought by the Mayor, Aldermen and Commonalty of the City of New York to recover possession from the New York Central & Hudson River Railroad Company of the pier located within the lines of 39th Street, reported in 69 Hun, affirmed in April, 1893, as proving title in the City.

Mr. Moore: We were not parties to that.

The Court: Are you offering it as *res adjudicata*?

Mr. Freedman: Yes.

Mr. Moore: We were not parties to that suit.

Mr. Freedman: It shows that the City has maintained a pier there ever since. The City recovered possession of it from the New York Central in 1891.

Mr. Moore: There is no fact established by that judgment which is evidence against us.

Mr. Freedman: It establishes the fact that the pier was there and was recovered by the City of New York.

The Court: You say that this judgment is competent evidence for what? The litigation was not between these parties, so it is not *res adjudicata*. What does it show?

Mr. Freedman: That the City of New York took possession of the pier, and recovered possession of the pier which has been in existence for a number of years, and that the City has maintained the pier ever since.



*Charles J. Farley—By Defendants—Direct* 817

The Court: There is no dispute about that fact, is there?

Mr. Freedman: They seem to dispute that there was a pier there for a number of years. They allege that a new pier was built by the plan of 1871. This is a pier that was built before the plan of 1871 came into effect.

The Court: I will reserve decision.

Exception to plaintiffs.

Marked Defendants' Exhibit E. 848

CHARLES J. FARLEY, called as a witness in behalf of the defendants, being duly sworn, testifies as follows:

*Direct examination by Mr. Freedman:*

Q. You are connected with the Dock Department? A. Yes.

Q. In what capacity? A. Chief clerk.

Q. You have been there for a number of years? Were you acting as Second Deputy Commissioner? 849  
A. Yes.

Q. I ask you to produce the rules and regulations adopted by the Commissioners of Docks.

(Witness produces document.)

Mr. Freedman: I offer in evidence rules and regulations adopted by the Commissioners of Docks, particularly with reference to those portions which prohibit the construction or the filling in or the building of any structures, whether on City property or privately-owned property, without the permission of the Department of Docks. I call your Honor's attention to the section of the Charter which authorized the Dock Department to make these rules.

850 *Charles J. Farley—By Defendants—Cross*

Mr. Moore: It was decided in the Court of Appeals in the Duryea case that the grantee under these grants could fill in his land without any request or permission from the City.

Mr. Freedman: But the Duryea case did not have a covenant on the part of the grantee that he would not make the land without the permission of the City.

Mr. Moore: There is no covenant of that kind in our grant.

851 Mr. Freedman: I refer you to the language of the grant.

Mr. Moore: The whole thing turns on the word "covenants." The covenant is to make the land in the streets. There is no covenant to make the land outside the streets.

The Court: I will take the evidence and I will pass on its materiality later.

Mr. Moore: I object to it as irrelevant and immaterial.

Decision reserved, with exception to plaintiffs' counsel.

852

Received and marked Defendants' Exhibit F.

*Cross examination by Mr. Moore:*

Q. How long have you been in the Dock Department? A. Twenty-seven years.

Q. Do you remember the pier in 39th Street, that was shown on this composite map here, as being there in 1860? A. Do I remember it?

Q. Yes? A. No.

Q. Do you remember that pier? A. Not in 1860, no.

Q. You remember the pier that was there—you remember that pier that was there that was torn down in 1899? A. No.

*Charles J. Farley—By Defendants—Cross*

853

Q. Do you mean to say that you are in the Dock Department and did not know that that pier was torn down in 1899? A. Yes.

Q. You don't remember then whether that pier was torn down at all or not, do you? A. I don't remember.

#### DEFENDANTS REST.

Mr. Moore: There is one fact that we omitted. There is a covenant in this deed to pay the taxes, and the City has brought out from Mr. Appleby the fact that they did not pay the taxes. I suppose that this will be urged as a defense here. The City has instituted proceedings to collect this tax, and we claim that that is a waiver of any violation of this covenant, and I would like to put those proceedings in evidence. We have the Appellate Division's decision on it.

854

The Court: You can offer the record in evidence.

Mr. Freedman: No objection.

The Court: They are considered in evidence and you may submit copies. (Plaintiff's Exhibits 92 and 93.)

855

#### CASE CLOSED.

The Court reserves decision and directs counsel to submit briefs and findings within two weeks.

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New York, November 27, 1916.

BANTON MOORE, Esq., for plaintiff.

EDWIN FREEDMAN, Esq., Assistant Corporation Counsel, for City of New York.

Mr. Freedman: If your Honor please, I think the first thing to be done here is that I should have an opportunity to amend the answer by setting up

*Case*

856

subsequent acts by the City of New York, in establishing a new bulkhead line inside the one which your Honor considered at that time. Pending your consideration of the case and the submitting of findings and the question of the determination of the damages the City acted under its charter powers and adopted a new plan in this locality with regard to the bulkhead line. This is subsequent to the trial that was had before your Honor.

The Court: Where is that line established?

857

Mr. Freedman: That line is established 100 feet inside the United States bulkhead line and the City's bulkhead line as it was adopted in 1871. I ask your Honor to amend the answer by setting that up.

Mr. Moore: We object to the amending of the answer at this time, as the facts were submitted, and of course it would be manifestly improper for the City of New York at this stage of the trial to pass any self-serving resolution which would attempt to deprive the parties of their property.

858

Motion denied. Exception to defendant.

Mr. Freedman: Generally stated, it is understood that the answer is amended by the City setting up action by the Dock Commissioners, adopting a plan for the improvement of the water front in the locality of the premises affected by the action, its submission to the Commissioners of the Sinking Fund, and the adoption of the resolution by the Commissioners of the Sinking Fund relative to such plan. Under that amendment, I offer in evidence from the City Record of June 14, 1916, the minutes of the Commissioners of the Sinking Fund, held on June 1, 1916, with reference to the adoption of this plan, and its action by the Dock Department. Do you want to make your objection?

Mr. Moore: You just offer it in evidence?

Mr. Freedman: Yes.

Mr. Moore: I shall not object to it as not being an original. But I object to this exhibit and this line of evidence on the ground it is immaterial, irrelevant and incompetent. That right at the outset it is manifestly improper and unlawful for the City to pass this action, and it is illegal as it is specifically stated in the Langdon case, which says after a grant is made to a private individual, such as the grant to Astor in that case, that the line thereafter cannot be changed without compensation; that it cannot be moved back 50 or 100 feet any more than it can be moved back to the original high water line.

860

The Court: I will allow the evidence and will consider the question when I render my decision.

Objection to the evidence sustained. Exception to defendant.

Mr. Moore: It is also objectionable under the law of 1871, which provides for compensation before making these changes on the city plan, and it says no change of the plan of those structures can be made by the City except in the ordinary manner of compensation by treaty or condemnation.

861

The Court: I will overrule your objections *pro forma* and consider it when I come to make my decision.

Exception to defendant.

Marked Defendant's Exhibit X for identification.

Mr. Freedman: Now, I offer in evidence the plan which was the subject of the preceding exhibit, which shows the line of the new bulkhead, and also

862 *Allen Newhall Spooner—By Plaintiffs—Direct*

the line of the old bulkhead. It is official, with the signatures of the Dock Commissioner and the various officials of the Sinking Fund Commissioners with their certificate.

Same objection.

Objection sustained. Exception to defendant.

Marked Defendant's Exhibit Y for identification.

Mr. Freedman: That closes our case.

863

ALLEN NEWHALL SPOONER, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

*Direct examination by Mr. Moore:*

Q. Mr. Spooner, what is your address? A. 17 Washington Square.

Q. And your business address? A. Pier 11, North River.

864 Q. What is your occupation? A. Civil engineer and contracting engineer.

Q. How long have you been engaged in that business? A. I graduated from the School of Mines, Columbia University, in 1886, and have been in the profession ever since.

Q. Will you state your experience and the work you have done which would tend to qualify you as an engineer? A. I will.

Q. And your familiarity with the water front of the City of New York? A. To save time, I will read it off.

Mr. Freedman: I will concede his qualifications. Mr. Spooner was at one time Dock Commissioner.

*Allen Newhall Spooner—By Plaintiffs—Direct* 865

Q. Mr. Spooner, are you familiar with the water front property on the North River, from 39th to 41st Streets, Borough of Manhattan, New York City? A. I am.

Q. How long have you been familiar with that property? A. Since 1887.

Q. Have you examined the sounding maps of the Dock Department which are in evidence in this case? A. I have.

Q. Have you examined also the other exhibits which have been produced in evidence in this trial? 866  
A. In regard to soundings, I have, yes.

Q. Have you estimated the depth of the water over this property in 1884 and 1916 from those maps? A. I have.

The Court: You have stipulated that in. We do not want to complicate the matter with maps. Let him say if he examined the stipulation.

Q. And you have examined the stipulation as to the depth of this water? A. I have. 867

The following stipulation is made:

For the purposes of the trial of this action, and for the convenience of Court and counsel, it is hereby

STIPULATED by and between the attorneys for the parties hereto that the average depths of water on the property affected by the action, are as follows:

On a line 50 feet west of the westerly line of 12th Avenue, between the center line of 39th Street and the center line of 41st Street, as follows: 1884—3 feet; 1916—20 feet.

Along the bulkhead line established by the Secretary of War in 1890 (which line is 150 feet westerly

868 *Allen Newhall Spooner—By Plaintiffs—Direct*

of the westerly line of 12th Avenue), between the same points: 1884—4 feet; 1916—20 feet.

On the westerly line of 13th Avenue, as established by the Act of 1837: 1884—20 feet; 1916—20 feet.

The average depth of water in the slips between 39th and 40th Streets and 40th and 41st Streets, extending from a line 50 feet westerly of the westerly line of 12th Avenue is as follows: 1884—3 feet; 1916—20 feet.

869 From a line 50 feet west of the westerly side of 12th Avenue to a line 150 feet west of the westerly side of 12th Avenue, or the bulkhead line established by the Secretary of War, as follows: 1884—4 feet; 1916—20 feet.

From the westerly side of 12th Avenue to the westerly side of 13th Avenue, as follows: 1884—10 feet; 1916—20 feet.

The above depths are calculated from mean low water.

870 IT IS FURTHER STIPULATED AND AGREED that the foregoing evidence is subject to all objections on the ground of incompetency, irrelevancy or immateriality. (This was marked Plaintiffs' Exhibit No. 96.)

Q. Have you prepared a plan for the construction of suitable and stable bulkheads along a line about 140 to 150 feet west of 12th Avenue between 39th and 40th Streets, 40th and 41st Streets, Borough of Manhattan? A. I have.

Q. And have you estimated the cost of the construction of such bulkheads on the assumption of the depth of water as stated in 1884 in the stipulation and in 1916? A. I have.

Q. What sort of bulkhead have you prepared in your plan as a suitable and stable bulkhead for that



*Allen Newhall Spooner—By Plaintiffs—Direct* 871

line? A. I have used the type of crib bulkhead similar to the same construction that was made by the city at 135th Street, North River.

The Court: What do you call it?

The Witness: A crib bulkhead.

Q. Have you that plan with you? A. I have.

Q. What, in your opinion, would be the fair and reasonable cost of such a bulkhead on the line specified between 140 to 150 feet west of 12th Avenue from 39th to 40th Streets in 1884? 872

Mr. Freedman: I object to that as immaterial, irrelevant and incompetent; under the evidence this plaintiff cannot build a bulkhead on a line 150 feet westerly of 12th Avenue.

The Court: I am going to allow him to prove it. This is on the Government line?

Mr. Moore: This is the Government line.

The Court: I will *pro forma* overrule it.

Mr. Freedman: I except.

A. If counsel will allow I would give the cost of the two blocks which are similar, between 39th and 40th and 40th and 41st Streets, the average depth of water being the same for the same type that is constructed at that particular place. 873

Q. Well, then, I will make the question read, what is the fair and reasonable cost for the two blocks 39th to 40th and 40th to 41st Streets?

Mr. Freedman: I object to that, if your Honor please, because it is not alone two blocks, but there are 120 feet in addition; half of 39th, the whole of 40th and the half of 41st Streets, that has to be built by this plaintiff, not only the two blocks.

Mr. Moore: That raises a question whether we built something on the City street without

874 *Allen Newhall Spooner—By Plaintiffs—Direct*

permission or not. I think if we built a bulkhead on our property, that is perfectly within our rights.

The Court: As I remember the grant, the city has a right to call on you to fill in those streets.

Mr. Moore: Yes, I want only to estimate the cost.

The Court: You cannot do it.

Mr. Moore: Unless we ask for permission.

875 The Court: Unless you get permission you cannot do it?

Mr. Moore: That is right.

The Court: Well, I will hear the testimony.

Mr. Freedman: I except.

A. For the two blocks, the total cost of a bulkhead of the stable type is \$13,932.80.

The Court: That is in 1884?

The Witness: Yes, sir.

876 Q. Have you estimated the fair and reasonable cost for constructing a bulkhead on the same line between the same streets, 39th to 40th and 40th to 41st Streets, in 1916? A. I have.

Q. What is the cost of such a bulkhead in 1916?

A. The cost is \$51,276.60.

Q. Mr. Spooner, are you familiar with the uses which are made of land under water in this vicinity?

A. I am.

Q. For slips and basins? A. Yes.

Q. Have you examined the leases and permits in evidence in this case? A. I have looked some of them over.

Q. What in your opinion is the fair and reasonable value for the use and occupation of the two blocks of land under water in this case to the City of New York for slips and basins?

*Allen Newhall Spooner—By Plaintiffs—Direct* 877

Mr. Freedman: I object to this on the ground the witness is not qualified as a real estate expert. I admit he is an expert as to dock building.

Mr. Moore: As the Dock Commissioner of the City of New York, he has had charge of rentals of land under water and property of that sort for a number of years.

Mr. Freedman: Not in ten or twelve years. I do not admit his qualifications as a real estate expert at all. 878

Mr. Moore: If the Dock Commissioner does not know what the rental value of land under water is, I do not know that anybody does.

Mr. Freedman: This gentleman is not engaged in the real estate business.

Mr. Moore: I will qualify him.

The Court: I think you better qualify him.

Mr. Freedman: My admission is as to his qualifications as to the building of a bulkhead and the dredging.

Q. How long were you Dock Commissioner of the City, Mr. Spooner? A. Two years. 879

Q. And during that time did you have charge of the rental of piers, wharfs, wharf property and land under water? A. I acted in the capacity of Commissioner of Docks.

The Court: I am not going to change my opinion on that subject, you know. I will exclude the testimony on the ground it is immaterial. There is no use of my sitting here and listening to it.

Mr. Moore: We do not want to waive any right. We think you ought to change your opinion on that.

880 *Allen Newhall Spooner—By Plaintiffs—Cross*

The Court: No. I will not change my opinion on that. I will exclude the testimony and give you an exception.

Mr. Moore: Not on the ground of qualifications?

The Court: No. On the ground it is irrelevant and immaterial.

Mr. Moore: And I will take an exception. That is all.

881 *Cross examination by Mr. Freedman:*

Q. Now, Mr. Spooner, will you please state to the Court what the difference consists of between the estimate in 1884 and 1916? A. The estimate in what way?

Q. What the difference consists of; is it a rise in the cost of materials? A. It is the difference in the size of the two bulkheads, necessary at different times.

882 Q. Do you mean to say that you would only have to build a bulkhead 5 feet in depth in 1884? A. I have not shown it as 5 feet. I have shown it a little deeper than that. I submit this map here, it shows two types of bulkheads. One could have been built in 1884—

Q. (Interrupting) I do not want to look at your maps. A. And the other could have been built in 1916. In fact, they were both necessary to reclaim ground to the street level at two separate times.

Q. Have you calculated any dredging in there? A. I did not calculate any dredging whatever, in neither case.

Q. Was there any dredging necessary to build the bulkhead in 1884? A. Not necessarily so.

Q. Do you know? A. I do know; it was not necessary.

*Allen Newhall Spooner—By Plaintiffs—Cross* 883

Q. Do you know the condition of the bottom of the river there from 32nd Street up to 42nd Street?

A. I do.

Q. Do you know that there is about 20 feet of mud there? A. Yes.

Q. Would the mud have to be dredged to build this bulkhead? A. It would not.

Q. What would you do, let it sink down? A. Yes.

Q. Let it sink down into the mud? A. Yes.

Q. And you would have to build the bulkhead 884  
above the mud? A. Yes.

Q. If the crib, the original crib, sank 20 feet in the mud, and 5 feet of water, you would have to build the crib 25 feet? A. If it did that; I don't know whether it would.

Q. Do you know whether it would? A. In my opinion, it would not.

Q. What do you base that opinion on? A. Experience in other cases.

Q. What other cases? A. Well, the cases where they have taken out cribs that have been placed— 885

Q. Where? A. South Brooklyn, foot of 27th Street.

Q. Do you know whether the bottom at South Brooklyn is the same as the Hudson River at this locality? A. I know it is partly mud.

Q. How much mud? A. There was about 12 feet of mud in one portion.

Q. About 30 feet? A. There was about 12 feet of mud in one portion, and the crib did not settle in that case over 3 or 4 feet.

The Court: It did not settle more than 3 or 4 feet?

The Witness: No, 3 or 4 feet.

The Court: And there was 12 feet of mud?

886 *Allen Newhall Spooner—By Plaintiffs—Cross*

The Witness: About 12 feet of mud.

The Court: And settled 3 or 4 feet?

The Witness: Yes.

Q. Do you remember Riker's Island? A. Yes.

Q. A crib was built there? A. Yes.

Q. How much did that sink? A. Well, that is a long while ago. I can only tell you it went down, as I recollect, 10 or 15 feet.

The Court: How much?

887 The Witness: 10 or 15 feet. But the condition was different at Riker's Island.

Q. In what way? A. Outside of the crib at Riker's Island it was deep water and on the inside it was mud. They built it right on the edge of the embankment. In this case it has equilibrium because the mud is on both sides of the construction.

Q. It would depend upon the quality of the mud how deep it would sink? A. Mud is mud.

Q. And some is of a different character? A. Well, it is denser as you go down.

888 Q. What would you estimate to be the cost in 1884 of building the bulkhead, assuming that there was 20 feet of mud below the 5 feet of water shown on the soundings of 1884? A. I did not make any estimate of the cost of the deep crib in 1884, but of course there is a material difference, a difference in the cost of material between 1884 and now, and a difference in labor.

Q. Does the \$51,276.60 in 1916 represent also or exclude also the difference in the cost of material and labor? A. From what?

Q. Since 1884? A. The estimate of 1916 crib is based on a reasonable cost of the present day materials.

*Allen Newhall Spooner—By Plaintiffs—Cross*

889

*By the Court:*

Q. Then? A. No, now; on the cost of it now.

Q. As it was in 1884? A. No.

Mr. Freedman: If your Honor please, that is a matter we cannot go into.

Q. As I understand you, you said that your figures for 1884 were based on the cost of labor and material in 1884, and the one for 1916 was based on the cost of labor and materials to-day? A. No, your Honor is not quite correct in that.

890

The Court: What I want to get at is the difference of cost in building a bulkhead line with the depth of water as it was in 1884 and building it now, and the cost of building it now with the depth of water such as it is now?

A. To answer that, your Honor, I have taken the present day market cost for both cases.

Q. You have taken it? A. Yes.

Q. Then, I misunderstood you? A. That is the idea. If we built that wall in 1884, our figures would be much lower than they are now.

891

*By Mr. Freedman:*

Q. You mean to tell the Court that you estimated the cost of both of these bulkheads on market prices this year? A. Yes, that is it.

Q. You said something about a crib at 135th Street, didn't you? A. I said that I designed this for a matter of stability, from that Dock Department crib at 135th Street, so that we would have some convenient type.

Q. Do you know whether there was any sinkage or any dredging done at that place? A. I was not in charge of that particular construction, but I

892 *Allen Newhall Spooner—By Plaintiffs—Cross*

remember the crib, as I recollect it, the crib settled some, they all do.

Q. Will you describe to the Court how these bulkheads are built, what you mean by a crib?

A. What do we mean by a crib?

Q. Just explain to the Court. A. The crib is built of logs, the roughest kind of logs, laid in the shape of boxes, sticks placed at right angles to each other, and spiked together. On some of the boxes it is floored over to hold stones, to sink the crib. Other boxes are left open at the bottom so that the stone carries right to the mud, and that is built up in successive tiers until finally the bottom reaches the bottom of the river and the top of it virtually comes above the water.

893

Q. In other words, the crib is a sort of box made out of rough logs for the purpose of holding the broken stone? A. It is the crudest kind of a boat.

Q. Boat? A. It is more as if you would sink a boat by filling it with stone.

Q. Is there any necessity of tying them back in any way, shape or form? A. Yes, sir. I have shown anchors in both these cribs here.

894

Q. Are you acquainted with the cost of fill?

Mr. Moore: I object to that. I do not claim anything as to the cost of fill. It is merely speculative, some people pay to dump and some people pay for fill.

(Question withdrawn.)

Mr. Moore: Have you any objection to offering that plan in evidence?

Mr. Friedman: No, not at all. I wish you would.

Mr. Moore: Or mark it for identification?

Mr. Freedman: No, mark it in evidence.

Same received in evidence as Plaintiffs' Exhibit 94.



*Allen N. Spooner—By Plffs.—Redirect—Recross* 895

Mr. Moore: Will you take this map (Referring to second map)?

Mr. Freedman: Yes, if Mr. Spooner identifies it.

Same received in evidence as Plaintiffs' Exhibit 95.

The Court: What are these, the plans?

Mr. Freedman: These are the plans of construction.

896

*Redirect examination by Mr. Moore:*

Q. Mr. Spooner, your plan calls for bulkhead just back of the line of 1890, doesn't it? A. Yes.

Q. Why did you set it back of the line? A. So that when the ground was reclaimed by the filling that it would allow a certain amount of movement without encroaching and going over this established bulkhead line.

The Court: I suppose he means he does it because if he put it further back it would trespass on the bulkhead line in the process of filling, is that the idea? 897

The Witness: That is it.

Mr. Freedman: The City concedes the cost would be the same on the 50 feet westerly of the westerly side of Twelfth Avenue as on the line 150 feet westerly.

*Recross examination by Mr. Freedman:*

Q. Do I understand that these soundings were at low water? A. Yes, sir, mean low water.

898 *Traugott F. Keller—By Defendants—Direct*

TRAUGOTT F. KELLER, called as a witness on behalf of the defendant City, being duly sworn, testified as follows:

*Direct examination by Mr. Freedman:*

Q. What is your business? A. Assistant engineer in the Department of Docks and Ferries.

Q. And how long have you been connected with the Department of Docks and Ferries? A. 12 years.

899 Q. And what has been your line of work during those number of years? A. I have been connected with the Division of Design, the Bureau of Engineering.

Q. Has that rendered you familiar with the work of bulkhead and the character of bulkhead construction? A. I believe so.

Q. And what is necessary, the first thing to do, in designing a bulkhead? A. About the first thing to do is to examine the bottom and the locality in which the bulkhead is to be built.

900 Q. That is for the purpose of what? A. Of designing a stable and suitable structure.

Q. Is it in connection with ascertaining where the firm or hard bottom of the river is to which the bulkhead must be constructed? A. That would be one of the things to find out.

Q. Are you familiar with the river conditions, or the bottom conditions of the river between Gansevoort Street and 46th Street? A. Yes, sir.

Q. Would you define the bottom of the river in that district? A. Starting at Gansevoort Street the bedrock will be located about 180 feet at a low point at 23rd Street, and gradually rising to about

Q. You mean 180 feet below what? A. Below low water.

*Traugott F. Keller—By Defendants—Direct* 901

*By the Court:*

Q. You mean the roadbed at 23rd Street is what?

A. 150 feet—I should say 180 feet.

Q. Below low water? A. Below low water along the bulkhead line.

Q. Which bulkhead line?

Mr. Freedman: That is the 150 line, if your Honor please, down there.

The Witness: Yes, and it runs up gradually until it hits a high point at about 50th Street, where it is about minus 35, that is 35 feet below water. 902

Q. At 50th Street, 35 feet? A. Below low water.

*By Mr. Freedman:*

Q. Between 39th and 41st Streets, what do you know with regard to the depth of the hard bottom below low water? A. The rock between 39th and 40th Streets along the bulkhead line is about 70 feet.

*By the Court:*

903

Q. 70? A. Below the water.

Q. At that place? A. At this place, and the hard bottom as we call it, is about minus 40.

*By Mr. Freedman:*

Q. How is that ascertained? A. From an examination of the test piles that were driven between 39th and 40th Streets and 41st Street in 1911, I believe are the ones I looked at.

Q. How were those test piles driven? A. They were driven by means of a pile driver. Do you want me to explain it?

Q. Yes. Explain the process of getting the test piles to ascertain the depth so that his Honor will understand it.

904      *Traugott F. Keller—By Defendants—Direct*

The Court: Do you disagree on this question; Mr. Spooner said 20 feet of mud?

Mr. Freedman: Yes.

The Court: Do you claim that is incorrect?

Mr. Freedman: They claim there was 20 feet of water and we claim there was so much necessary dredging to get down to the bottom, and it cost more than his estimate.

Mr. Moore: It is stipulated here.

905      Mr. Freedman: I am not changing the depth of water. The depth of water is there, but the depth of the mud is not testified to.

The Court: I understand Mr. Spooner to testify below this depth of water, at both times, I suppose he meant, in 1884 and 1916, there was 20 feet of mud.

Mr. Freedman: He did not testify it would sink that deep.

The Court: I know, but didn't he testify in 1884 and 1916 there was 20 feet of mud?

Mr. Freedman: I am not sure.

906      The Court: I asked him whether he knew it and he said 20 feet.

Q. Assuming there was 20 feet of mud below the depth of water stipulated in this case, in 1884, on a line 150 feet westerly of the westerly line of 12th Avenue, what was necessary to be done to build the bulkhead as required under the grant?

Mr. Moore: That would be 40 feet below in 1884.

The Court: He said 20 feet below on each date.

Q. What is it necessary to do in the construction of a bulkhead, the first thing to do after you have ascertained the nature of the dredging? A. Is to clean out to get to hard bottom.

*Trangott F. Keller—By Defendants—Direct* 907

*By the Court:*

Q. To clean out to get to hard bottom? A. Yes, sir.

Q. You would not put the crib down in the mud?  
A. It would not be safe.

*By Mr. Freedman:*

Q. What do you mean by saying it would not be safe to put the crib in the mud? A. The mud at that point being of such a soft, yielding nature, if the crib was not founded on firm, hard bottom, when the filling would be filled in the mud wave that would be created by the filling would tend to throw the crib out of line and possibly—the Lord knows where it would stop. 908

Q. Have you made an estimate as to the cost of construction of the bulkhead between the center line of 39th Street and the center line of 41st Street on land 150 feet westerly of the westerly side of Twelfth Avenue?

Mr. Moore: I object to the testimony of this witness. He has not yet shown him to be qualified. 909

Mr. Freedman: Twelve years in the Dock Department, continually at work in designing the character and construction of bulkheads?

The Court: I think he ought to be qualified to testify as to the cost of construction.

Mr. Moore: I do not suppose he has ever constructed a bulkhead.

The Court: Cross examine him.

*By Mr. Moore (on the voir dire):*

Q. Have you ever personally built a bulkhead?  
A. I have not.

910      *Traugott F. Keller—By Defendants—Direct*

Q. Have you ever personally taken a test pile?  
A. I have not.

Q. Have you ever taken a sounding of any sort personally? A. I have not.

Q. And how do you know that the rock is 40 feet below? A. By the records taken of those who know how to do those things.

Q. All those records were made by somebody else, weren't they? A. Oh, yes.

911      Mr. Moore: I contend the witness is not qualified.

The Court: That is not examining him on his qualifications as an expert. You are examining him as to the facts to which he testified. I understood you wanted to examine him as to his qualifications to express an opinion as to the cost of building cribs?

Mr. Moore: He said he never built any.

The Court: He says he never built any, but of course he may have made contracts for them.

912      *By Mr. Freedman:*

Q. In what capacity have you acted? A. For the past two years I have been absolutely in charge of the Division of Design, letting out the engineering work, preparing plans, specifications, and forms of contracts and estimates for all contracts and construction work for the Department of Docks and Ferries. In 1915 that alone amounted to \$2,500,000 and in 1916 perhaps \$3,000,000.

*By the Court:*

Q. Have you had any experience in making contracts for the purpose of doing this work, or have you only been letting out the engineering features?  
A. I have had charge of the plans and specifications.

*Traugott F. Keller—By Defendants—Direct* 913

Q. Have you had experience in making contracts on behalf of the city, incorporating the terms of the contract? A. No, sir, that is the Commissioner's work.

*By Mr. Freedman:*

Q. Any of this work done under your supervision? A. No.

Q. Do you make any calculations in connection with this work based upon the cost of materials? A. Absolutely. 914

Q. Are you continually employed in making estimates for the Department of Docks and Ferries for the purpose of letting this kind of work? A. Yes.

Q. Do you keep yourself advised as to the current prices of materials? A. I do.

Q. And make your investigations with regard to the nature of the bottom, and the places where the structures are to be erected? A. Yes, sir.

Q. Have you examined the sounding records that are in evidence in this case? A. I have.

Q. And in making this estimate that I have asked you about have those soundings entered into consideration in making up your estimate? A. Yes, sir. 915

Q. Together with the knowledge you ascertained of the current prices in continually making up these estimates for the Department of Docks and Ferries for the last year? A. Yes.

*By the Court:*

Q. These calculations were based on your knowledge of prices and your calculations from the papers in evidence as to the depths? A. Yes.

The Court: Then he can testify under that as to what the cost is.

Mr. Moore: I take an exception.

916      *Traugott F. Keller—By Defendants—Direct*

*By Mr. Freedman:*

Q. Now, give us the price, per foot, for the building of a crib bulkhead 39th and 41st Streets, on the North River, on a line 150 feet west of the westerly line of 12th Avenue, upon the soundings of 1884? A. The crib bulkhead along the 150 feet line would in my opinion cost \$225 a linear foot.

917      Q. And how many feet are there between the center of West 39th Street and the center line of West 41st Street? A. I believe about 520. I did not look into the length.

Q. So that the total amount would be \$225 multiplied by 520? A. Yes, sir.

Q. Have you made any estimate or have you been furnished with any estimate as to the cost of dredging in connection with the building of that bulkhead? A. My estimate is made absolutely without any reference to the cleaning out of the bottom; simply for construction.

Q. Simply on the cost of the bulkhead? A. For the construction itself.

918      Q. What was your estimate as to the cost of the bulkhead on the line 150 feet west of the westerly line of Twelfth Avenue in 1916? A. On what line?

Q. 150 feet west? A. It would be the same kind of construction to this; the price would be \$225 per linear foot.

Q. And your figure for 1884 was based on those prices? A. Absolutely.

Q. What was your estimate as to a bulkhead built on a line 50 feet west of the westerly line of Twelfth Avenue in 1884 and 1916?

Mr. Moore: That is subject to the same objection, as immaterial, irrelevant and incompetent.

Objection overruled. Exception.



*Traugott F. Keller—By Defendants—Cross* 919

A. That would be the same.

Q. In other words, \$225 a foot? A. Ought to cover construction in both cases.

Mr. Freedman: That is all.

The Court: As a matter of fact, he puts it this way, that the only difference then is the difference of dredging?

Mr. Freedman: Well, our price is higher than their price.

The Court: I have not figured it. But he puts a price higher? 920

Mr. Freedman: He puts a price higher, plus the dredging.

The Court: Then the question comes down to the difference of the price, and what would be the price of dredging that 10 or 15 feet of mud?

Mr. Freedman: Yes.

The Court: He has not said what that is?

Mr. Freedman: He has not testified to it. I have another witness to testify as to the cost of that dredging. 921

Q. Is the price of \$225 exclusive of the cost of dredging? A. It is.

*Cross examined by Mr. Moore:*

Q. Did you state the depth of the mud down to hard pan at this point was 70 feet? A. I did not. I said the depth to bed rock at that point was minus 70.

Q. The test pile of course that you had access to; what does that mean, 70 feet down—when you made the depth of 70 feet, what does that mean, hard pan or rock? A. In this particular case it was rock.

922      *Traugott F. Keller—By Defendants—Cross*

Q. Are not all test piles driven to the same point, either hard pan or rock? A. No. Well, if you drive to rock you cannot drive any further, of course.

Q. Aren't there some records in the Dock Department to show whether a test pile goes to hard pan or to rock? A. If by records you mean specifications?

Q. Only by specifications? A. Our specifications. A test pile or a pile driven, for the last ten blows would not drive the pile more than one foot, and they would measure the pile, and under those conditions they would find firm bottom, that is not necessarily rock. Rock may be any distance below that.

Q. When you come to that point where you drive it a foot, you know that is the depth of the mud? A. Not at all. The mud is taken—that is simply the depth from the water to the river bottom which is called the mud line.

Q. That is uniform in all cases, isn't it? A. What do you mean, uniform?

Q. You use the same method in all cases of test piling around the city, don't you? A. Yes.

Q. Is your estimate of the cost of bulkhead, showing the cost of bulkhead, based upon going down to the point given by the test pile record of the Department of Docks and Ferries? A. I just explained as to the Dock Department specifically, about that pile driving the last foot of penetration, ten blows of the hammer. Is that the point you refer to?

Q. Yes. A. I do not, no, sir. My construction is not based on that point.

Q. Where did you stop your dredging as you spoke of, for this bulkhead, at what point down?

A. We have assumed in this particular locality that a crib would have to go down to minus 40; in other words, that minus 40 in my opinion is the bottom that is necessary for a stable and suitable crib bulkhead. That is not the specification pile driving point, though. That is the point where the pile blows, the hammer would sink of its own weight before one blow of the hammer was put on it.

Q. Why do you say it is necessary to go down to minus 40? A. Because our experience has shown that. The point where the pile and hammer, of their own weight, sink the pile to, is the point that is called firm or hard bottom for a crib bulkhead. The stuff that is above that is the softest kind of this North River bottom mud, and is absolutely unsuitable to push a crib through. It is unsafe. The crib would not stand there. It would push out. 926

Q. Well, would it push out if it had the same sort of material in front as behind it? A. You are going to fill, are you not? 927

Q. I am asking you the question. You are not asking me a question. Would a bulkhead push out if it had the same sort of material in front of it as behind it? A. The same sort of material, no, not in itself; it would simply be suspended in the mud there.

Q. It would be stationary, wouldn't it? A. No.

Q. It would be practically stationary except for the fill behind it? A. It would be stationary so far as lateral movement is concerned, but an up and down movement, it would go down through the mud. As far as in and out shore is concerned, it may stay there, but up and down, it will sink through the soft mud, due to the weight of the stuff

928      *Traugott F. Keller—By Defendants—Cross*

that is on top, the stones, the logs and iron, but lateral, in and out shore, the chances are it is going to stay more or less in the alignment, but it is going to sink.

Q. Do you know what kind of mud was there in 1884?

Mr. Freedman: I object to that as immaterial, what kind of mud.

The Court: I will let him examine on that. This is cross examination.

929

A. I assume the same North River dock mud existed in 1884 as it does now. Still called North River dock mud.

Q. When you speak of North River dock mud, you mean mud that floats in with the tide? A. It is hard to describe it; some stuff comes in with the tide, through sewerage, soft, oozy muck.

Q. That is what you call floatage mud? A. What kind of mud?

Q. Floatage mud? A. Fluid mud?

930

Q. Floatage? A. I don't know where it comes from, where the floatage dock mud comes from. It is there, I know, but the occasion I don't know. But our experience has shown all through the North River, from 23d Street—

Q. Wait a minute. I will ask a question. The longer mud is there the harder it settles, doesn't it? A. Perhaps in the air, not in water, not with the tidal conditions we have.

Q. Don't you know that the bottom of this river bed which has been there for centuries upon centuries would be harder and more stable than mud that comes in there after the dredging? In other words, don't you think that the natural river bottom would be harder and more stable to build upon? A. The natural river bed would most likely.

*Traugott F. Keller—By Defendants—Cross* 931

The Court: What do you mean by that, hard bottom?

Mr. Moore: Yes, sir.

The Witness: I cannot define what natural river bed was.

Q. Have you any information to show that the bottom of this river was three or four feet below mean low water in 1884, showing the natural river bottom in 1884? A. No. You will have to go back to Hudson's time for that. I don't know when the natural river bed was. 932

*By the Court:*

Q. As I understand your testimony, it is that hard bottom was 40 feet below the water in 1884 and 1916? A. Same today. The bottom has not been disturbed, and it still exists there.

*By Mr. Moore:*

Q. How much do you allow in your estimate of cost for the dredging necessary in 1884? A. I did not take it under consideration. 933

Q. Didn't you contemplate the dredging to put the bulkhead in? A. Absolutely. But it is not stated in the construction cost.

The Court: He did not include it in his estimate of cost.

Mr. Moore: How has he estimated the cost?

The Witness: I assume the Dredging Department is taking care of that. It is simply construction I have given you, \$225.

Mr. Moore: I object to the testimony on the ground it is not based upon facts.

Mr. Freedman: I am going to supply the cost of dredging by another man.

934 *Allen Newhall Spooner—By Plaintiffs—Direct*

The Court: I asked him that question and he said he had another man, that this man could not testify to the cost of dredging, but he has another witness to do that.

Q. How do you know that this crib would settle to that depth in 1884?

The Court: He does not know it would settle. He did not testify to that.

935 Mr. Moore: His testimony is based upon a construction of a crib 40 feet below the low water and I object to his testimony and move to strike it out because it has no bearing on the case.

The Court: I deny that motion. I will consider it when I come to it. I have some questions I want to ask Mr. Spooner, if you are finished.

Mr. Moore: Yes, sir.

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936 ALLEN NEWHALL SPOONER, recalled, further testifies:

*By the Court:*

Q. Mr. Spooner, I do not understand what you included in your difference between the \$13,932.80 and \$51,276.60. What does that consist of; that consists of the difference of the cost, of the necessity for dredging that 15 feet of mud? A. I will try to explain it to your Honor. In the early days the crib bulkhead was practically the oldest style of dock front. In 1884 they did have dredges, but most of the private owners constructed these cribs right upon the surface of the river bottom or under water at any particular place. It made a cheap, inexpensive bulkhead, where on sand it did not

*Allan Newhall Spooner—By Plaintiffs—Direct* 937

settle or where on rock it did not settle, but where it was not on rock formation, but on alluvial deposit, that is what the mud is called, they place the cribs and fill it with stone, there was some settlement, and that settlement was indeterminate. There is not an engineer today that can tell exactly how deep those cribs that were laid on the surface of the mud would settle. In some places they settle more than others, because the alluvial deposit is of different density. In my assumption I assumed that the crib was laid on the virgin soil that had been there for years, and I gave it an experienced depth of what I thought it would settle below that surface, which was about four or five feet. Then I compared that with the crib in the bottom that had been disturbed by dredging down to a depth of 20 feet below water, that had been refilled partially from time to time with the light alluvial deposit, without the consolidation of years. Therefore, that 20 feet, that being originally only three or four feet deep, it left the consolidation of that material above it down to the 20 feet; it made it comparatively more bottom or a more dense bottom of that mud at 20 feet than it was up above from later deposit. Now, I take a constructed crib, an average crib, on the basis of 20 feet below mean low water, allowing it to settle at least two feet, and inasmuch as it had to be a more massive construction in order to retain the filling—

Q. A more what? A. A more massive construction to retain the filling, for this reason—

Q. Because you had to fill it deeper? A. No. There is another point: For this reason, when the original bottom was there, it was pretty near a gradual slope there, and when you put your crib in it, you had support both on the outside and inside. When the 20 feet depth was constructed for

940 *Allen Newhall Spooner—By Plaintiffs—Direct*

the dredging at 20 feet depth, has got to remain, and you have got to fill in back of it; in other words, you have a retaining structure 20 or 30 feet.

Q. When you say back, do you mean east or west of it? A. East of it, filled in back of it; in other words, you cannot put filling on the outside of the wall there now, because the government would not allow you; you could not reclaim that ground by just going to work and dumping that stuff anywhere you like, and therefore that was 911 the reason for holding back and making upland out of that property. I claim the two different types of crib may be and are the practical construction of it, one with this bottom and the other with the other bottom, and the only difference would be this, at the present time you would have deeper water on the outside of it, and therefore could bring in larger ships to that bulkhead, that was the result, but not of design; and in the old case you would have shallow water and just have a bulkhead to hold the filling.

942 Q. This difference, if I understand it right, of cost is represented by the fact that they have taken out 15 feet of the original soil, and therefore it cost just that much more to build a bulkhead under present conditions in view of the fact that the soil has been taken out, than it would to have built the bulkhead, is that it, to hold this filling when the water was only five feet? A. Exactly so, that is the point.

Q. And the difference in cost consists in, first, you have got to build it deeper, and, second, you have got to build it stronger? A. Yes, sir.

Q. Those are the two elements? A. Yes, sir.



*Allen Newhall Spooner—By Plaintiffs—Direct* 943

*By Mr. Freedman:*

Q. The Dock Department has rules and regulations with reference to building these structures, haven't they?

Mr. Moore: I object to that. The rules and regulations do not apply.

The Court: I do not know, but I am going to let him find out, and if they do not apply, that may be brought out on cross examination.

A. What particular structure do you refer to? 944

Q. Such a bulkhead as you have described. A. I never heard of any rules and regulations.

Q. The plans must be submitted to the Dock Department, mustn't they? A. All plans are submitted to the Dock Department; but there are no rules and regulations with regard to cribs.

Q. In the size of the cribs? A. There are no rules and regulations; they are part of the specifications.

Q. They have specifications, I will call it? A. The Dock Department's function in that matter is to see whether a design is capable of withstanding the proper loads and pressures. 945

Q. As Dock Commissioner, would you permit a bulkhead to be built on the surface of that mud today? A. On private property, I certainly would; they still are building them now.

Q. Have you approved such plans while you were Commissioner of Docks? A. I cannot recollect any now. It cannot be hard to find any record of it.

Q. The plans for those structures must be submitted to the Dock Department? A. The plans for any structure under its jurisdiction must be submitted for their approval.

946 *Charles E. Trout—By Defendants—Direct*

Q. Unless those plans come up to the requirements of the Dock Department, they are not permitted to be adopted and constructed, are they?

A. That is about so, unless you can prove they are about substantially so.

*By Mr. Moore:*

Q. The plans that you prepared, are they substantial as to the existing bulkhead on Mr. Appleby's property for this location, at the present time?

947 A. Better, if anything, better.

Q. Those bulkheads have been there how many years? A. I could not tell you. They were there prior to 1889.

*By Mr. Freedman:*

Q. How do you know? A. I took soundings.

Q. You yourself? A. Yes, personally.

RECESS.

948 CHARLES E. TROUT, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

*Direct examination by Mr. Freedman:*

Q. What is your profession, Mr. Trout? A. Civil engineer.

Q. And you have been employed where? A. In the Department of Docks and Ferries.

Q. For how long? A. Since the beginning of 1900.

Q. And what has your work consisted of in that department? A. I spent five years in the Bureau of Design and one year in charge of dredging operations. Since that time I have been in charge of

*Charles E. Trout—By Defendants—Direct*

949

dredging and surveying and supervision of private work.

Q. By that you mean that you have had charge of all the dredging in connection with any improvements of the City of New York for the Department of Docks and Ferries? A. Yes, sir.

Q. Are you familiar with the district of North River, in the neighborhood of 39th and 41st Streets? A. I am.

Q. Is it your opinion or is it not your opinion that in connection with the building of any bulkhead between 39th and 41st Streets dredging is necessary? A. It is.

950

Q. To what extent? A. Well, the mud on the site of the proposed crib must be taken out.

Q. How far or to what? A. To the hard bottom.

Q. And have you any information as to how much mud would be necessary to be dredged? A. At least 20 feet.

Q. Does that apply to a line 150 feet west of the westerly line of Twelfth Avenue as well as to a line of 50 feet west of the westerly line of Twelfth Avenue, does it apply to both lines? A. It applies to both lines.

951

Q. In other words, dredging to the extent of 20 feet to hard bottom would have to be made to either line to fit the condition of affairs for a bulkhead? A. Approximately, yes.

Q. What, in your judgment, is the cost of the dredging necessary to fit that property for the building of a bulkhead such as was described by Mr. Kellar?

Mr. Moore: I object to that, because he does not specify how much of the dredging.

The Court: Do you mean in his testimony here?

952

*Charles E. Trout—By Defendants—Direct*

Mr. Freedman: As to the building of a bulkhead such as Mr. Keller described.

The Court: He did not describe any bulkhead as I know of.

Q. Take the bulkhead described by Mr. Spooner.

Mr. Moore: It would not be necessary to dredge it at all, the 1884 bulkhead.

The Court: Why not?

953

Mr. Moore: Because he fills it right on the property as it exists.

The Court: He said he would have to go down to hard bottom.

Mr. Moore: Mr. Spooner does not.

The Court: But this witness does, and I will take the testimony.

Exception to plaintiff.

A. On the line 150 feet west of Twelfth Avenue, the dredging would cost approximately \$12,600.

Q. On which set of soundings? A. On the 1916 soundings, the present soundings.

954

Q. And what would it cost on the 1884 soundings? A. About \$21,600.

Q. Now, have you made a similar calculation as to a line 50 feet westerly of the westerly line of Twelfth Avenue? A. There would be no material difference.

Q. The amount of dredging would be practically the same? A. Practically the same.

The Court: That is, the cost would be about the same?

The Witness: About the same.

Q. Now, Mr. Trout, from your experience have you any criticism to make as to the character and construction of the bulkhead such as described by

*Charles E. Trout—By Defendants—Cross*

955

Mr. Spooner? A. I am quite sure that the bulkhead described by Mr. Spooner would not stand.

Mr. Moore: I object to that as too general.

The Court: Which one?

The Witness: Either of them.

Q. Constructed in the manner in which he testified to it? A. Yes, sir.

Q. Are you familiar with any bulkheads in this neighborhood? A. There was a bulkhead which I dredged out running from 44th Street to a point north of 46th Street, to a point north of 45th Street, which extended to a depth of over 40 feet below mean low water. 956

Q. Was that built in the same manner?

Mr. Moore: I object to this as entirely collateral to the issues, what was built at 46th Street. There are all sorts of bulkheads built.

The Court: I think this is matter for cross-examination.

*Cross examined by Mr. Moore:*

957

Q. Where is the bottom on which it would be set to rest, a bulkhead between 39th and 41st Street, how deep below mean low water? A. At least 40 feet below mean low water.

Q. Why do you say at least 40 feet? A. Because the test pile information shows that, soft mud extended to at least that depth.

Q. Is that test pile information noted on the sounding maps? A. It is not; I think not.

Q. There is a test pile information shown on some of your records as to which Mr. Kellar testified to this morning about 70 feet? A. That is the total penetration of the pile.

958 *Charles E. Trout—By Defendants—Cross*

*By the Court:*

Q. What is that? A. The 70 feet is the total penetration of the pile.

Q. 70 feet to rock bottom? A. Yes, sir.

*By Mr. Moore:*

Q. Is there any difference in this mud as it goes down those 70 feet? A. Yes, it gets much stiffer below 40 feet.

959 Q. Does it get stiffer before it gets to 40 feet? A. Probably so. The pile goes down to a grade of about 40 feet below mean low water under its own weight, and the weight of the hammer. That is very soft mud.

Q. When were these test piles driven that you have in mind? A. My memory is it was driven in 1911, I am not sure.

Q. Then, there would be nothing to show from the test piles as to what the condition was in 1884? A. No, sir.

960 Q. Then, this mud that you speak of having to remove, haven't you got in mind there the mud that comes back after the property has been dredged? A. No, sir. The property was dredged to a grade of 20 feet below mean low water, that is approximately the grade that is there now.

Q. And when you say you would have to dredge out the mud to build the bulkhead, don't you mean the mud that has to come back there after the dredging? A. No, sir, I do not mean that at all; I mean the mud that has always been there.

Q. Why do you think it would be necessary to dredge out this mud in order to build a bulkhead there? A. Because mud is a viscus substance, even under a light load will slowly get in a motion, and a crib set in it will be carried along by the motion

*Charles E. Trout—By Defendants—Cross*

961

of the mud itself, carried out of position, even if it did not settle, which it certainly would.

Q. What do you mean by getting in motion, run out or run in? A. I mean it will run out under the load of the filling.

Q. That is, it runs out laterally, not longitudinally? A. It is apt to rise and a light bulkhead placed on the mud will quite likely be thrown up when the filling was placed.

The Court: Do you mean the mud, the pressure of the filling would drive the mud out into the stream?

962

The Witness: Yes, sir.

Q. Suppose the mud had the same equilibrium on both sides of the bulkhead, what would happen then? A. That is, of the same equilibrium on both sides; it is the fill that sets the motion, too.

Q. The fill is back of the bulkhead? A. Yes. The weight of the fill sets the mud in motion.

Q. You mean the fill would push the mud underneath the bulkhead and up on the other side? A. Yes, sir, it acts exactly like dough or molasses candy or anything of that sort that flows slowly.

963

Q. How high would that mud rise on the out shore side of the bulkhead? A. It might not rise very high, but it frequently rises to a height of several feet in such cases.

*By the Court:*

Q. What would the effect of that be on the bulkhead? A. It might carry a light bulkhead right up with it, it frequently does that.

Q. Carry the bulkhead up? A. Yes.

Q. That would not do any harm? A. It would collapse it in the process, your Honor.

964 *Charles E. Trout—By Defendants—Cross*

*By Mr. Moore:*

Q. If it was anchored down? A. There is no way to anchor it. There is nothing to anchor it to but the mud.

Q. Don't you often drive piles back of the bulkhead and anchor the bulkhead to the piles? A. You cannot do that in this case because there is mud there; all of the mud back of the bulkhead under the pressure of the fill will get into slow motion.

965 Q. How far back do you think this mud extends, easterly? A. The mud extends easterly to the face of the present bulkhead.

Q. Prior to the present bulkhead, don't you suppose it extended further easterly? A. I have no information whatever.

The Court: Is the present bulkhead down to hard pan?

The Witness: I have never known a crib bulkhead that was not carried down to hard bottom; but we have no information about this one.

966 Q. Don't you know that the present bulkhead on this property is only 10 or 12 feet deep? A. I do not.

Q. Do you know anything about it? A. No, sir.

Q. Do you know whether that bulkhead has been there for nearly half a century? A. I think it is entirely likely that it has been.

Q. And it has not become out of order in that time? A. Yes, sir.

Q. Or sunk down? A. Yes, sir.

Q. And that is a very cheaply constructed crib bulkhead? A. I don't know that.

Q. You don't know? A. No.

Q. Assuming that a scow loaded with rocks sank in the mud which existed on this property, which



*Charles E. Trout—By Defendants—Cross*

967

we claim existed on this property in 1884, how deep would that scow sink in the mud? A. I don't know.

Q. You have no knowledge which would enable you to answer that question? A. I cannot answer that, no. It is entirely likely that in time this scow would be entirely buried in the mud.

Q. You do not think it would sink 20 or 40 feet in the mud, though, do you? A. Not necessarily.

Q. And yet you say in order to build a crib bulk-head there it would be necessary to dredge out 40 feet in depth? A. I do, positively. 968

*By the Court:*

Q. Along the river front there if the property is dredged does it fill up afterwards? A. Yes, sir.

Q. With the same character of mud that was on it before? A. No, sir.

Q. What is the difference? A. The mud that comes after dredging is a black, very light, almost fluid mud; the other is a greenish mud, and quite a little thickening.

Q. How much does it fill up after dredging; for instance, this property was dredged out to 20 feet below water, did it stay dredged out or has it been filled in? A. It has been dredged more than once.

Q. It keeps filling in? A. Yes, sir, it has been redredged I forget how many times.

Q. And the mud that was there originally was of the stiffer quality than this light mud? A. Yes, sir.

Q. Does the mud that was there originally get stiffer as it goes down? A. Yes, sir.

Q. Gradually? A. Yes, sir.

*By Mr. Moore:*

Q. You never took any test pile measurements of this property, did you? A. No, I did not take them.

969

970 *Allen Newhall Spooner—By Plaintiffs—Direct*

*By Mr. Friedman:*

Q. They are records of the department? A. They are.

Q. Accessible to you and other commissioners?

A. Yes, sir.

*By Mr. Moore:*

971 Q. Isn't it a fact different length of piles are often used for test piling, for instance, don't they sometimes use short piles and at other times long piles? A. Certainly.

Q. Of course, those long piles weigh more and sink deeper? A. We use a long pile where we expect deep penetration and a short pile where we do not.

Q. Do not the long piles weigh more than the short piles, necessarily? A. Yes, sir, necessarily.

Mr. Freedman: That is all, if your Honor please.

The Court: I want to ask Mr. Spooner some questions.

972

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ALLEN NEWHALL SPOONER, resumed the stand.

*Examined by the Court:*

Q. What have you to say with regard to this idea about the pier or the crib as you have described going down to rock bottom or to hard bottom? A. I think it is absolutely ridiculous.

Q. Did you ever know of a case in which you heard it did not go to rock bottom? A. I never knew a crib to sink that far in my life.

Q. You never knew a crib to be put down to hard bottom? A. Yes, I have known them, some now built, but none of that kind.

*Allen Newhall Spooner—By Plaintiffs—Direct* 973

Q. Did you ever know a crib that was not put down to hard bottom? A. Yes, sir. I know lots of them.

Q. Where? A. There is one over at the foot of 27th Street, Brooklyn. There is one up at the——

Q. How long has the one in 27th Street, Brooklyn, been down? A. That has been a great many years.

Q. How near to rock bottom did it go? A. As far as we could get to it, driving piles outside of it, it was about 12 feet of mud from the bottom down to where we could find hard bottom there. 974

Q. Had it been built in behind? A. It had been built in behind, yes, sir.

Q. After the crib was there? A. Yes, sir, after it had been there.

Q. And how long had it been or how long since it was built? A. Oh, it has been built there, well now I cannot tell you from my own knowledge of that.

Q. How long did you know it had been filled in? A. I know the man they say did fill in; they told me it was filled in 40 years ago. 975

Mr. Freedman: I object to that.

Q. How long have you known it to be filled in; how long are you familiar with the fact it was there; how long have you known the premises to be in perfect condition? A. I am trying to get the exact date. I have known that particular crib has been filled in about seven years.

Q. And how do you know it did not go down to hard bottom, you say you dredged it? A. No, I will explain it to you: Adjacent to this crib was to be placed a dry dock, and we knew or we made measurements down to see how far the crib went down to see whether it was safe to drive down be-

976 *Allen Newhall Spooner—By Plaintiffs—Direct*

low the bottom of that crib. Now, we know that crib would be endangered by dredging deeper than where it stood on the bottom. After we decided where this dry dock would be placed, why we drove closed piling all along the bulkhead, and tied that into the bulkhead, and that would hold the crib by going into the deeper slip which had been dredged on the outside below its bottom. They dredged 10 or 12 feet below the bottom of this crib, and the crib collapsed. In that case there was no

977 equilibrium. The equilibrium on the out shore where it was shallow water, when it became deep water displaced its equilibrium, and the crib went over into the slip, notwithstanding that close piling was driven alongside of it. On another portion of the same property where the crib had been put on the hard bottom and they dredged alongside of it to a considerable depth below the crib, the thing stayed there and is staying there today, so that the putting of a crib on mud is a common practice. It has been put up at other places.

978

Mr. Freedman: I move to strike out the entire testimony on the ground it is immaterial, irrelevant and incompetent. It is an entirely different place, and the bottom of the river may be entirely different, and the consistency of the mud may be different.

The Court: The testimony of your witness is that he has gone down to hard pan and he says he never knew of a case.

Mr. Freedman: There must have been hard pan at 12 feet.

The Witness: I want to tell you this thing about the line of demarcation where a crib would remain at rest and where it would not. The fact is Mr. Trout admitted there were 40

*Allen Newhall Spooner—By Plaintiffs—Direct* 979

feet of mud and he was going to put his crib on top of 20 feet of mud after the dredging, so that notwithstanding he said my crib would not stand he said his own crib will stand on top of 20 feet of mud.

Q. I understood he was going to excavate 40 feet? A. 20 feet.

Q. 20 feet and more? A. No, he was not going down 40 feet.

Mr. Freedman: Down below, 40 feet below mean low water. 980

Q. To a point 40 feet below low water, whatever the distance, or in other words, his proposition is that you must always go down to hard bottom?

A. As a matter of fact I do not believe, from my recollection, of seeing one of those test piles, the test piles went down to 81 feet, and it may have eventually struck on rock, but there was a layer of mud in between it. I admit the crib would settle some when it is put on, but just where it would stop is another question. My argument is this, in speaking of a crib as a weight, I claim if you take a loaded canal boat, a common practice up the river in putting in bulkheads cheaply, they would get an old canal boat and fill it in with stones, and those scows I have never seen one of them go below the surface so far that they did not act as a bulkhead. For instance, where I put the bulkhead in in this case— 981

Q. You say they won't go below the surface? A. They did not.

*By Mr. Freedman:*

Q. It is an entirely different thing, from a crib?

A. No, both are boats.

982 *Allen Newhall Spooner—By Plaintiffs—Direct*

Mr. Freedman: You see where this leads to. I will have to bring my own expert to answer this testimony.

The Court: I am not an expert. Here these two witnesses contradict each other and I have to decide between them.

The Witness: I have another parallel case over at the Palisades Park Commission; they have been filling up the site with stones.

*By the Court:*

983

Q. I am taking your testimony under oath, you are testifying? A. Absolutely, that is what I understand. Over at Pallisade Park Commission they drove piles there 80 feet deep.

984

Q. 80 feet deep? A. 80 feet long, I mean, showing it is the same character of mud, as near as could be as this place at 40th Street. This is at Englewood, at the other side. The lower mouth of the Hudson River is alluvial deposit. The Pallisade Park Commission have put in stone there and filled it in until it got down to what they call mud floatation, and they built up a nice bulkhead up to the grade of the ferry terminal there, without putting in the crib bulkhead, by just throwing in stones. That mud at that particular place is at least 100 feet deep. I know we have driven piles down there 60 feet below the surface of the water, and about 7 or 8 feet of depth of water at the present time. In other words, what I am trying to show to you is, if stone filling will float in the mud, that you can conceive of a crib also floating in the mud, and not necessarily having to go down to hard bottom. Why, that bulkhead at Pallisades Park would cost millions of dollars if any such ridiculous thing as a man having to dredge out

*Allen Newhall Spooner—By Plaintiffs—Direct* 985

that 40 feet of mud and to put in that stone, happened. Another similar case is at Fort Lee Ferry where they put in rip rap there that floated in the mud, and they have been waiting for two years to settle it down at the bottom, and, it is not down yet, and I was called as an expert and told them what they might expect and they were very well pleased with my report and they carried it out, as far as I know. In other words, your Honor, the difference is this, nobody can exactly say the exact level that a crib would settle, but the crib of 1884 is of very much lighter construction than the other. 986

Q. Why? A. Because it does not need to be so big.

Q. Because it does not go down so deep, is that the reason? A. Absolutely, you have got to build.

Q. Is that the reason, you do not have to go down, make it so big, because the mud was deeper?

A. That is the idea exactly.

Q. That is the only reason? A. That is the only reason. In shallow water you do not need as big a bulkhead as the other. 987

Q. Your calculation of these damages is based on the fact that by taking out 20 feet of this soft mud, a more expensive kind of crib is made necessary? A. Absolutely.

Q. That is the point? A. That is the point I want to make clearly.

Q. That is all there is? A. That is all there is to it two different types of crib for two different depths of water. Shallow crib a less expensive structure than it would cost in deeper water. The deeper water has to act as a retaining structure. Do I make that clear, your Honor?

Q. Just a minute. You have got many other instances where you say that cribs have been built

988 *Allen Newhall Spooner—By Plaintiffs—Direct*

on mud? A. Yes, all along the Hudson; they simply put in the ground just what happened to be there.

Q. All these bulkheads built here in the city along the North River, are they down to hard bottom, or are they just on the mud surface, do you know? A. The bulkheads, that is a different type of a bulkhead, your Honor. Your Honor, the bulkhead wall is called a sea wall to differentiate it from the common crib bulkhead, and there they build a larger retaining structure, and dredge from the out-  
989 shore side, therefore that always makes those walls down to hard bottom, as the best way they can do it.

Q. If you were going to fill in that property, had filled it in, we will say in 1884, why you would fill it out to that bulkhead line, and would the pressure of the fill have driven the mud underneath the crib? A. Perhaps the best way to explain that to you is this, if you take—

Mr. Freedman: I think your Honor's question calls for a categorical answer. I ask that  
990 it be answered yes or no.

Q. What do you say about that, I ask you your opinion? A. Will you please read it?

Q. (Read) A crib such as you say you would have constructed at that time? A. It would not drive it under the crib; it might move the crib out-  
shore somewhat but that was the reason in the figures I submitted here I moved it back 10 feet so that it would not encroach over that line, when you fill up on one side and not the other, there would be a horizontal component pressure that would have a tendency to shove it in the direction of the side that was free from fill.

Q. Wouldn't it continue? A. No, sir.



*Allen Newhall Spooner—By Plaintiffs—Direct* 991

Q. It would never reach an equilibrium? A. It would consolidate, it would move until the earth filling got consolidated.

Q. Into what? A. Mud, the earth that was consolidated; in other words, until it took less earth and put it in, for the fill it would shrink in time, in other words, the particles would come closer together, so that what we call a consolidation of the earth by the crib might move, in fact, we anticipate it would move when filling was placed behind it, but the crib that I designed there would hold that filling substantially, for that height and depth of water. 992

Q. What height and depth of water? A. The three feet depth of 1884.

Q. In other words, you would put the fill that was necessary to fill out the surface of that water, above the surface of the water? A. Yes; or the surface of the street more particularly.

Q. The surface of the street? A. Yes; from low water up to the surface of the street is about 10 feet and the depth of water in this particular instance averages about three feet below the water. 993

Q. Do you know cases where that sort of a crib where it has been built and held? A. Yes; I do. I know a lot of them, but I have to stop for a moment to think of several of them.

Q. You said one was down in 27th Street Brooklyn? A. Yes. There is another one in the Dock Department that was placed at the end of about 38th Street, East River, where behind the wall there to hold the filling, where the sea wall terminated, it was necessary to keep the filling confined, also from running around the end of it, we put the crib 50 feet deep on the mud and filled it in with stone the same as this is, and afterwards carried the filling in back of it, and that crib is there to-day.

994 *Allen Newhall Spooner—By Plaintiffs—Direct*

*By Mr. Freedman:*

Q. Where is that located? A. 38th Street, on the south end of the old 38th Street section.

*By the Court:*

Q. And that crib held? A. That crib is there now.

Q. And the filling was put in behind it? A. Yes.

*By Mr. Freedman:*

995 Q. East River? A. Yes, sir.

*By the Court:*

Q. How much filling was put in? A. It was brought up to the grade of the street. It was built up the old grade as the wall itself; the only thing this was a confining crib placed at the end of the wall.

996 Q. Any other cases you know of? A. Yes, at 97th Street, East River, we have had occasion to do work there. In those days they made what they call, instead of making—made slips at the cribs, what they call return slips, which they used to build into the solid land and put cribs in the side. The crib has been up there between 97th and 98th Street, been there as long as I can remember, since 1890. They were built before my time. I have driven some piles in front of them also to protect them from going into the river. Those cribs are there to-day, although they moved after the dredging.

Q. Were they placed on mud? A. They were placed on mud, yes, sir.

Q. They were placed on mud and they held? A. Yes, sir. The way we found that out is by examination, and putting rods down and finding out what is down below. In fact, the crib that I have

*Allen Newhall Spooner—By Plaintiffs—Direct* 997

shown is identical in dimensions almost with the one that was built by the city at 135th and 137th Streets, North River, which was of like character of mud as at 40th Street here, and that crib is still standing, and the lower end, I understand, has settled considerably. On this other property, your Honor, I had occasion to repair the crib, between 40th and 41st Streets——

Mr. Freedman: I object to any further testimony. There is no question before the witness. 998

Mr. Moore: The Court is asking him for information.

Q. Is there any other instance that you know of?

A. I just happened to be reminded about 40th to 41st Street. We rebuilt that crib a few years ago.

Q. Was that on mud? A. That was on mud. That crib, as far as we could ascertain was not 8 feet below the water in its original form.

Q. That was between what streets? A. 40th and 41st Streets, further in shore. 999

Q. This other property? A. Yes, sir, and that is on mud.

Q. You put the crib in there? A. We repaired the crib.

Mr. Moore: That was put in before he was born, your Honor.

Q. Where is the crib on the bulkhead? A. It is on the bulkhead.

Q. The present bulkhead? A. The present bulkhead. That has now structures upon it and filled in.

Q. Did you ever have any occasion to investigate the present bulkhead on Twelfth Avenue to

1000 *Allen Newhall Spooner—By Plaintiffs—Direct*

see whether that went down to hard pan? A. On Twelfth Avenue?

Q. Yes. A. The one on this other property that exists today, the bulkhead, I think, is inside of Twelfth Avenue, east of it.

Q. East of the side of Twelfth Avenue? A. Yes, I believe that crib we had three years ago.

Q. Built that? A. We built it.

Q. Was that on mud? A. That was on mud.

Q. Are you sure that was on mud? A. I am sure  
1001 that was on mud.

Q. There is evidence here that that stood for five years; you say it was on mud? A. Yes, sir, it was on mud, yes, sir, absolutely.

Q. How do you know? A. Well, we tried to determine where it was, the bottom of it, and we could only feel the timbers down with an iron rod to seven and eight feet below low water.

Mr. Freedman: That is no proof, however, there were no timbers below, because you could not feel them below eight feet.

1002 The Witness: The best knowledge anybody can get.

*By Mr. Moore:*

Q. There was mud in between the two timbers?  
A. I say that is the best knowledge you can get.

Mr. Freedman: That was the best knowledge you could get as far as you went?

The Court: Your witness said he believed it was on hard rock. He did not make an examination.

Mr. Moore: He did not know anything about it.

The Court: He said he never had seen a bulkhead that was not on rock.

*Allen Newhall Spooner—By Plaintiffs—Direct* 1003

The Witness: As a matter of fact, there is no rock under that portion of the bulkhead, because I drove a pile there about 45 feet long, as I recollect it, 45 feet below the water right at that old bulkhead.

*By the Court:*

Q. How did that show it was not down to hard bottom? A. Well, because the driving of the pile, we could tell in driving that the same as you drive a test pile, you can tell whether that pile goes three or four feet with the weight of the hammer on top of the pile. 1004

Q. The pile may have gone down below the bottom of the crib? A. What is that?

Q. The pile might have gone down below the bottom of the crib? A. That is right.

Q. It does not show because you put a pile outside of a bulkhead down a certain depth, it does not show the crib went down that depth? A. It does not. I want to impress upon you the crib is still on mud. 1005

Q. How do you know that crib was on mud? A. Because I felt down, I could shove the rod down through the mud, what we call a sounding rod, to find out where the bottom of the crib was.

Q. Shoved it through the mud? A. Through the mud.

Q. Outside the crib? A. Yes, sir.

Q. How would that show how far the crib went down? A. You could feel the timbers with the rod.

Q. (Repeated.) A. You could feel the timbers, the timbers are loose logs, you can feel them with the rod; that is the way you can find out where you went, and how deep a crib goes, and the way to do

1006 *Charles W. Staniford—By Defendants—Direct*

it is to take a rod and poke down as far as you can through the soft mud, and see if you can locate it.

Q. And you went down and found below 8 feet there was no crib? A. As far as my examination went, we could not find that crib down below 8 feet.

Q. That is right on this other property? A. Right on this other property.

*By Mr. Moore:*

1007 Q. Isn't it a fact also that the continual dredging of the city in front of this Twelfth Avenue crib bulkhead would have a tendency to unsettle it? A. Yes, it would have a tendency to undermine it or have it consolidated.

(Adjourned *sine die* for the purpose of having Mr. Freedman call a witness.)

January 2, 1917.

1008 CHARLES W. STANIFORD, called for defendant, being duly sworn, testified as follows:

*By Mr. Freedman:*

Q. What position do you hold in connection with the City government? A. Chief engineer, Department of Docks and Ferries.

Q. How long have you been chief engineer of the Department of Docks and Ferries? A. Over 28 years.

Q. Will you state to the Court your experience in connection with the various lines of duty you have had to perform in your time in connection with that Department?

Mr. Moore: I object to that as too broad.  
Objection overruled. Exception.

*Charles W. Staniford—By Defendants—Direct* 1009

A. In charge of the construction work of the Department work done by the city, and supervision of the work done by all private owners on the water front, in a general way.

*By the Court:*

Q. You say you are chief engineer of Docks and Ferries? A. Yes.

Q. How long have you been chief engineer of Docks and Ferries? A. Eleven years.

*By Mr. Freedman:*

1010

Q. In that time you have had supervision and charge in general of all the construction work in the City of New York? A. Absolutely; all the water front work.

Q. In connection with your position as chief engineer, has it been necessary for you to keep yourself informed as to the method and character of construction of bulkheads in various localities in the City of New York? A. It has, yes.

Q. What was your position prior to your position as chief engineer? A. For about thirteen years I had charge of the division of surface and dredging examinations, and borings, under the title of surveyor. 1011

Q. For the entire city? A. Of the whole City of New York, the water front, the Dock Department as constituted at that time.

Q. The old City of New York and the Borough of the Bronx, is that it? A. Until the consolidation of the Greater New York.

Q. And what position did you occupy prior to that? A. Assistant to that bureau.

Q. And in connection with all those positions, has it rendered it necessary for you to familiarize

**1012**      *Charles W. Staniford—By Defendants—Direct*

yourself with the character and nature of construction, and the character and nature of bottom, where construction work is done? A. It has, yes.

Q. What has been your experience in connection with the building of crib bulkhead on mud?

Mr. Moore: I object to that as too broad. I concede that the witness is qualified.

Question withdrawn.

**1013**      Q. What is your opinion with regard to the building of a crib bulkhead upon mud in the districts on the North River or in the City of New York, as to stability and capability of sustaining a load behind it? A. You say in the City of New York; in what district did you mean?

Q. Take the City of New York? A. Answering it in a general way, and answering the question as put, on mud, then I will say that the mud must be removed to create a stable crib work for the retention of filling.

**1014**      Q. In explanation of that answer, would you just explain to the Court in a general way the method of construction and the proceedings necessary to build a crib, with reference to that preceding answer of yours? State the course of procedure, taking a given place, where there is ten or twenty feet of mud; what is the course of procedure to place stable cribwork?

Mr. Moore: I object to that, as the witness should be limited to the most economical and sensible way of sustaining a crib, and also have in mind 65 feet of mud.

Objection overruled.

A. I mean what I say, except I would like to amplify that if it is wanted.



*Charles W. Staniford—By Defendants—Cross* 1015

Q. Is there any way in which you desire to amplify that answer? A. Yes; I will simply say that there are all kinds of mud, from very insufficient mud to fairly good mud. I say mud, that the mud must be removed, meaning a certain amount, a certain class, certain kind of mud, as found in certain specific places. I do not think that you can classify or compare mud in any one locality as to its sustaining power, with another, except in a general way, that you must make a detailed examination at the site, where you want to build. 1016

*By the Court:*

Q. Then, in other words, it depends upon the mud? A. Yes, but my answer is in a general way that the mud must be removed.

Q. But there is some mud that need not be removed in order to make a stable crib? A. All the top mud in any event must be removed, such as that which we call mud, and not harder or better material.

Q. You do not mean to say you have to go down to hard rock all the time? A. Not at all, no, sir; not hard rock. 1017

Q. In other words, there is some earth you can build on? A. Yes, some classes of earth, and not classified as mud.

Q. Some classes of earth you can build on? A. Yes.

*Cross examined by Mr. Moore:*

Q. What is your definition of a crib? A. It is a series of logs, laid in cells, or compartments, and filled with some solid material to stick it to the bottom, usually rock.

Q. Do you know how it is defined in the dictionaries? A. I have not looked it up.

1018 *Charles W. Staniford—By Defendants—Cross*

Q. Don't you know that it is defined as a strong floating structure by the dictionaries? A. I know that it is not considered so in engineering or in New York, in practice, by anybody, as far as my experience has ever gone, no. It is floated in building, but it is pumped to the bottom by rock contained in a series of compartments or cells, filled up, so as to make it stable; it is the rock that makes it stable against being pushed into the river floor.

1019 Q. Do you know anything about the crib on the North River between 39th Street to 41st Street?  
A. The interior crib, as it exists?

Q. Yes, the present crib as it stands there? A. Yes.

Q. Do you know when that was built? A. I don't know the date, no; I have not looked it up.

Q. Would it surprise you to know that that crib was built about 63 years ago? A. It might have been. I did not think it was quite so long.

1020 Q. In 1853. Would it also surprise you to know that that crib had been constructed there only about eight or nine feet below mean low water, and had stayed there over 63 years?

Mr. Freedman: I object to that, as there is no proof to that effect in this case.

Objection overruled. Exception.

A. I would not be surprised. I don't know. It might have been. I don't know.

The Court: Counsel has talked about being nine feet below mean low water.

A. (Continued) I don't know what the depth is.

Q. In your 24 years' experience in the Dock Department, you never came across any facts which would acquaint you with the depth of a crib at that point? A. No.

*Charles W. Staniford—By Defendants—Cross* 1021

*By the Court :*

Q. Do you know anything about the character of the mud at that point? A. Yes.

Q. What is it? A. It is very insufficient for stability for crib building. I will go further, and say that it is one of the worst—

Mr. Moore: I object to that. The witness should be confined to the mud as it existed in 1884, when this old crib was constructed, and the same mud that was there then and not the mud that is there now, because from the frequent dredging of the Dock Department at this particular point, it is quite possible that all the solid mud has been removed, and accumulations have come in there, which of course would not be stable, and would be an entirely different class of mud that was there in 1884.

1022

Q. How long have you known the condition of the mud there? A. Not on that one block, but in the immediate vicinity.

Q. I am talking of that block? A. I have known it for the past year.

1023

Q. You only know it during the past year? A. Yes, that is the exact condition of it. I know it in a general way, always have, for twenty-eight years.

*By Mr. Freedman :*

Q. Do you know the character of the mud north and south of this property? A. I do.

Q. And for how far north and south? A. As far as the Battery south, and as far north as Spuyten Duyvil.

Q. What is the nearest locality that you are acquainted with relatively, with regard to 39th to

1024 *Charles W. Staniford—By Defendants—Cross*

41st Streets, North River? A. The mud itself, or for crib building?

Q. For crib building; that is all with reference to crib building? A. For crib building—

Mr. Moore: I object to that because it is absurd that the witness should be acquainted with everything between this property and the Battery and everything north of this property.

Objection overruled. Exception.

1025 A. The nearest actual work that would compare for crib building north was from 79th to 83d Streets, North River, where the city dredged for the building of a crib. To the south, the nearest actual personal experience I have had to that about mud bottom is in the neighborhood of from 42d Street down to 30th Street, where we dredged and built and took up and moved all kinds of bottom to create a bulkhead wall, which is similar to crib work.

Q. That is from 42d Street to what street? A. From 30th Street to 42d Street. I should have said 44th Street.

1026

*By the Court:*

Q. That involves this front, then? A. It is the same front; it is just directly south.

Q. It takes it all in; it includes this particular piece? A. I wanted to make it plain that for an actual crib I went up to 79th Street to 83d Street, but for the moving and handling of this mud bottom I went to 43d Street.

Q. So you have been dredging mud between 44th Street and 30th Street, covering this very property? A. Ever since I went in the department.

Q. That is 28 years? A. Yes.

*Charles W. Staniford—By Defendants—Cross*

1027

Q. What did you find on this property? A. I simply revert to my first question, that this mud is very insufficient for stability for the building of cribwork, and it is further insufficient for the building and holding of any structure in the water. That has been my experience in the Dock Department in building and combatting this soft mud in this location as it exists there.

Q. And what did you mean when I asked you how long you had known mud on this property, by saying that you had only known it for the last year? A. That was that one block, I thought you meant that block. For in the last year I have had borings taken since the dredges were down there, and I have found out intimately its condition.

1028

Q. Have you noticed whether the dredging has made any change in the mud, the dredging that was done by the city in this locality, has it caused any change to take place in the character of the mud. As a result of the dredging has any other mud come in so as to change the character of the mud from what it was before the dredging? A. In my opinion it simply removed the deposits that come into the New York harbor, into the slips, to the depth that we have dredged in the past year, in my opinion that bottom is practically the same bottom that originally existed there, and we dredged down through and beyond the zone of the silt, and sewage that would naturally float into the slip.

1029

Q. That is you have not dredged down so as to remove the original mud? A. I think not, that is my opinion.

*By Mr. Moore:*

Q. Dredging down is not the best method of determining the density of mud? A. It is not the method, this dredging is done as a result of determining as to whether the dredging is necessary.

1030 *Charles E. Trout—By Defendants—Direct*

CHARLES E. TROUT, recalled for defendant, further testified:

*By Mr. Freedman:*

Q. You were present during the trial of this case recently before Judge Pendleton? A. Yes.

Q. You were present and heard Mr. Spooner testify? A. Yes.

Q. Mr. Spooner testified with reference to the crib at 27th Street in Brooklyn? A. I was not present then——

1031 Q. Were you furnished with the stenographer's minutes of the session? A. Yes.

Q. And have you read the testimony of Mr. Spooner as to that crib? A. Yes.

Q. Did you make any investigation with regard to that crib? A. I was already familiar with the location of the crib.

Q. Will you please state what the condition of affairs was at the locality at which that crib was built? A. The conditions in the neighborhood of 27th Street Brooklyn are a thin layer of mud overlying a very hard sand bottom. The crib appears to go down to the hard sand. I don't know at what time the crib was built, it has been there a very long time, and I am of the opinion that the layer of mud that is there now has probably been deposited since the crib was built.

1032 Q. Is there any comparison between the character of the bottom in that neighborhood and the character of the bottom between 39th and 41st streets? A. There is absolutely no comparison.

*By the Court:*

Q. You mean there is no similarity? A. No similarity, no.

*Charles E. Trout—By Defendants—Direct*

1033

*By Mr. Freedman:*

Q. Do you remember reading the testimony or hearing the testimony of Mr. Spooner with regard to the building of a rip rap embankment at Palisades Park? A. I read that testimony.

Q. Will you state what you have to say with regard to that and what your experience has been with regard to a similar embankment?

Mr. Moore: I object to that as immaterial.

Q. Do you know anything about the fact of the rip rap embankment at the Palisades Park? A. No, sir.

1034

Mr. Freedman: Then I withdraw the question.

Q. Do you remember reading the testimony of Mr. Spooner as to the question of placing his crib within ten feet in shore of the bulkhead line, in this locality in question, 39th and 41st Streets, what have you got to say with regard to that.

Mr. Moore: I object to that as immaterial. Objection overruled. Exception.

1035

A. A crib bulkhead placed ten feet back from the bulkhead line would not be any more stable than on the bulkhead line and would not be a satisfactory retain structure between 39th and 41st Streets, North River. The danger to that crib is of the mud passing out under the crib due to the load of the back fill and carrying the bottom of the crib with it.

*By the Court:*

Q. You mean the bottom of the crib or the ground under the crib? A. The ground under the

1036 *Charles E. Trout—By Defendants—Direct*

crib will move out due to the pressure of the back fill, and of course it will carry the crib with it, from the fact that the crib rests on the under laying material, and if that material is in motion, the crib will sink and be thrown out of line, and wrecked.

Q. Why has not that happened? A. There is no crib there. It will happen if the crib is put there.

*By Mr. Freedman:*

1037 Q. Mr. Spooner also testified with reference to a crib of a similar sort to be built at 38th Street, that was built on mud. Have you any information, or did you ascertain anything with regard to that crib? A. That crib ran in shore from the end of the bulkhead wall built north through the center line of the lot between 37th and 38th Streets, the crib ran inshore on about the center line of the block on a mud bottom. It was an absolute failure. It failed due to the pressure of the back fill, having stood up fairly well until the filling was placed, and the bottom of the crib was carried out, and the

1038 crib rolled over backwards, and the river bottom in front of the crib was rolled up from six to eight feet.

Q. I show you a document and ask you whether you are familiar with the signature attached to that document? A. Yes.

Q. Is that Mr. Spooner's signature? A. Yes.

Mr. Freedman: I offer in evidence so much of this document as relates to the crib about which the witness has just testified over Mr. Spooner's own signature when he was assistant engineer in the Department of Docks and Ferries, as follows: "The crib which was placed as a bulkhead to retain the earth filling and running from the south end of the wall to



*Charles E. Trout—By Defendants—Direct* 1039

the crib bulkhead on the southerly half of the block between 37th and 38th Street East River, has also settled about five feet from its original elevation immediately adjacent to the platform, and has tilted over to the north to an angle of about 20 degrees. The westerly end of this crib has settled somewhat, but not nearly so much as the easterly end, and is likewise tilted."

*By Mr. Moore:* 1040

Q. Is that crib still there? A. It is as far as I know.

*By Mr. Freedman:*

Q. Mr. Spooner also testified with regard to a crib at 97th Street East River, did you make any examination of this crib? A. I did.

Q. And what did you find? A. I found that the crib extends at least to the hard bottom, about eighteen feet below mean low water.

*By the Court:* 1041

Q. That is the crib that is there now? A. Yes.

*By Mr. Freedman:*

Q. Mr. Spooner also gave as an instance, crib work at 135th and 137th Street, North River. Were you familiar with that crib? A. I am.

Q. Will you state what facts you know with regard to that crib? A. That crib was dredged as was shown by Mr. Spooner's own exhibit to an average depth of about 22 feet below mean low water. The mud was all taken out.

Q. Did you make any examination of the present bulkhead as it exists between 39th and 41st Streets, North River, on a line somewhat easterly of the easterly line of Twelfth Avenue? A. I did.

1042 *Charles E. Trout—By Defendants—Cross*

Q. And what did you find as to the depth of that crib? A. I was unable to find the bottom of that crib with rods. The crib extends down eight or ten feet, and I was unable to push a sounding rod into the bottom below the point, the lowest point at which I could find the crib. In other words, the crib stands on hard bottom.

*Cross examined by Mr. Moore:*

1043 Q. You know that the mud from 39th to 41st Streets, along the 1890 bulkhead line in about 65 to 75 feet deep, so that by constructing a bulkhead down 40 feet you would still be resting on mud? A. Yes, you probably would.

1044 Q. And isn't it possible that the weight of the fill back of it would have the same effect upon a bulkhead 40 feet deep as it would upon a lower depth or a shallower depth? A. In the main I testified that a crib was to be founded upon a depth under which a pile would sink under the weight of the hammer. Experience, however, shows that the mud which would support a pile under the weight of the hammer would be a fairly good bottom for a crib.

Q. And when you have in mind the weight which a pile will support under a hammer, you have in mind that it penetrates through 20 feet of water at this point, before it reaches the earth, don't you? A. Yes.

Q. So isn't it quite possible that if the pile was driven into mud which was only three feet below mean low water, that it would not extend to the same depth as it would if it was driven through 20 feet of water or dropped through 20 feet of water? A. Yes, that is possible.

Q. When the pile is dropped through water, it goes faster than it would through the mud? A.

*Charles E. Trout—By Defendants—Cross*

1015

The speed at which the pile drops has nothing to do with it.

Q. The only test piles on which you based your information are test piles in 1911? A. That is as I remember it.

Q. Are you willing as an engineer to state that a test pile taken in 1911 is a proper basis to determine the depth at which a crib should be sunk in 1884? A. As a general proposition stated in that way, no. But in this specific case the test piles taken in 1911 between 39th and 41st Streets, are an adequate guide to the depth to which the crib should be sunk if it were put there in 1884.

1046

Q. In other words, this case is an exception to the general rule? A. There is no general rule. The general rule has not been stated at least.

Q. Now if the test piles had been taken in 1884, what is your opinion as to the depth to which they would have penetrated under the same weight of the hammer?

Mr. Freedman: I object to that as assuming a fact which was not done. It is incompetent, irrelevant and immaterial.

1047

Question withdrawn.

Q. Do you know the density of salt water?

Mr. Freedman: I object to that as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. I don't remember its specific gravity exactly. No.

Q. Do you know it is about 64 pounds? A. Yes.

Q. What is the density by weight of mud? A. I don't remember its specific gravity, either.

Q. It is about 108 to 120 pounds, is it? A. I think you have it high enough.

1048 *Allen Newhall Spooner—By Plaintiffs—Direct*

Q. At this crib at 38th Street, there are coal pockets on top of the crib, aren't there? A. No, I don't think there are.

Mr. Freedman: I withdraw the question.  
Defendant rests.

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ALLEN N. SPOONER, recalled in rebuttal, further testified:

1049 *By Mr. Moore:*

Q. Since the trial did you make a re-examination of the bulkhead from 40th to 41st Street, North River? A. I did.

Q. Will you state the result of your examination of that crib there?

Mr. Freedman: I object to that as immaterial, irrelevant and incompetent, what the condition of that crib is today.

Objection overruled. Exception.

1050 A. On November 30th, 1915, I went to that particular locality at about 60 feet north of the north side of 40th Street and North River, and I took up and made an examination with a rod through one of the open crib pockets, and found that the depth of the crib, according as it is located by the flooring, was substantially eight feet below low water, and that by pushing a rod one inch in diameter through the crevices of the logs forming the floor of the crib, that I could push it down five feet below the crib, showing that the crib rested on mud. Subsequently I went up there on December 12th, in conjunction with another man, and I took a rod and went along the bulkhead, and took four separate soundings, and I found on the top of the surface

*Allen Newhall Spooner—By Plaintiffs—Cross* 1051

there was a kind of a crust from the drift that had gone in through the bulkhead; but after feeling particularly in four separate and distinct places, the deepest I found was about four feet below low water. I found no portion of the crib between 40th and 41st Streets, which is on the, or to the east line of Twelfth Avenue, that was being supported otherwise than on a mud bottom.

*By the Court:*

Q. How did you find that out? A. I pushed the rod down until I found out the crib logs. 1052

Q. Five feet below the bottom of the crib? A. Yes, I had a rod twenty feet long. And the crib is about nine feet above low water mark and eight feet below. To check up my investigation through the old method of building cribs, which was to make the width of the base above the total height of the crib, in this case I found the crib was about sixteen feet wide, as nearly as I could ascertain it, and the nine feet of its height above low water and 8 feet below low water, would make it about 17 feet, which approximates the width and height of the crib. I am perfectly satisfied that that crib is resting on mud. I had no trouble in shoving a rod, not only on the outside of the crib, but on the interior of the crib, down to a depth of five feet below the bottom as I found it. 1053

*Cross examined by Mr. Freedman:*

Q. How far is the bottom of a crib generally from the bottom of the log. A. The crib flooring is placed one tier above the lower part of the crib, but it may be at various heights. It is according to the—

Q. Anywheres from one to three feet? A. Yes.

1054 *Allen Newhall Spooner—By Plaintiffs—Cross*

Q. So that the crib would extend one to three feet possibly below the flooring, and that you found with your rod? A. That is barely possible.

Q. Is it possible also that some of those cribs may be built with a double flooring? A. What do you mean?

Q. A crib built on a crib? A. Why, I never saw one.

Q. Is it possible? A. Anything is possible.

1055 Q. You don't know whether that was done in this case or not, do you? A. I am positive in my opinion in this particular case, that that crib only went down eight feet.

Q. I did not ask your opinion, I asked you whether you are positive that that was not in this case from your own knowledge? A. Yes, I am positive it was not done. That is my investigation.

*By the Court:*

1056 Q. In this crib that was there, is the pressure on the crib that was there just as great as it would be on a crib at the bulkhead line? A. I think that the Court has not got a very clear idea of these particular premises that I have assumed. What we are trying to show by the present crib is this, that the crib can be placed on the top of the mud, and there is only three feet of water in front of this crib today at low tide. In the stipulations of three feet depth of water and 20 feet depth of water, the thing had to be assumed on some basis of the density of the soil, but in both cases I have assumed that dredging operations had not been obtained at all in either case except so far as they would show the physical present conditions of the premises, therefore I testified the crib in this case, assuming that there was three feet of water depth at mean low tide, and another 20 feet in both cases assuming that the old virgin stiff mud was there, as it was

*Allen Newhall Spooner—By Plaintiffs—Cross* 1057

probably in 1884, that portion of the City had shown no deep dredging, it was shallow dredging, more for ash scows and canal boats—

Now, the fact has been brought out here by the City that the crib should go down forty feet. As a matter of fact the test piling that I examined showed that there was a layer of mud there that extends 80 feet deep, the only difference between the City and myself is a matter of degree, as to where to put the crib. They have taken a test in this connection in 1911, and make that a basis of that for both 1884 and for 1916, which in my opinion is based on a false premise. The method of putting it down by a test pile is to drop by its own weight into the soil, and then place about a 3,000 or 4,000 pound hammer on top of it, and see how far it goes down. In this case a test pile was taken after a great deal of dredging there, not only once, but several times. At the grade of 20 feet there were many of the soundings that showed 22 and 24 feet. Therefore that test pile of 1911 is not a fair or good thing to take as a base to put their crib bulkhead on at the present time. Now, the idea of proving this crib that existed there since 1884 was to show that the soil originally was sufficiently dense and strong to withstand it, inasmuch as it had stood the test for sixty years. 1058

Q. But did it have the same weight behind it in the way of fill that it would have had on the bulkhead line? A. I looked up an old map of 1784, and it showed that the original high water line went back 200 feet east of Eleventh Avenue. That is all filled in. It also shows in the vicinity of 42d Street, not only the high water line went up to Ninth Avenue, which was all marsh land— 1059

1060      *Allen Newhall Spooner—By Plaintiffs—Cross*

*By Mr. Moore:*

Q. Isn't it a fact that on the present crib there are buildings constructed and coal pockets? A. On the present crib it supports a coal bin and a house, a one-story house there. The coal is loaded on top of that bulkhead to the extent of eight or nine feet, which shows it is capable of carrying it.

*By Mr. Freedman:*

1061      Q. Water gets shallower as you go in shore or towards the highwater mark, as well as the mud? A. Well, as well as the mud, I do not see what you mean by that. The water does, yes.

Q. And the mud gets shallower also? A. It naturally does, yes.

1062      Q. So that fill at 600 feet from highwater mark to the present bulkhead would not proportionately carry the same load as 250 feet from the present bulkhead or 150 feet further into the river? A. I have shown two separate and distinct propositions in my designs, I have not shown the same crib in two places. I have proportioned the crib.

Q. How far do you propose to put down your crib at the 50 feet line? A. On the basis that it was stiff mud, from 20 feet down, which I had a right to assume, and inasmuch as it was stipulated on the depth.

Q. Assuming there was 20 feet of water at the 50-foot line? A. Yes.

Q. That is the depth today? A. I don't know what there is today.

Q. There would be less water today than the facts upon which you have built your assumed crib?

A. It would set on 20 feet of stiff mud, 20 feet of mud sure.

Q. If there was three feet of water and 20 feet of water, your crib was designed to go down nine



*Allen Newhall Spooner—By Plaintiffs—Cross* 1063

feet? A. Not at all. One crib was designed to go down in the 3 feet depth of water down to about 8 feet.

Q. Where is your 3 feet of water? A. In the stipulation.

Q. And the 20 feet of water? A. It was all through there in those days.

Mr. Moore: I offer in evidence receipted bill for the construction of a bulkhead on this very property in 1853.

Mr. Freedman: Objected to as immaterial and irrelevant because they have shown on their own proof it has been repaired a number of times since. 1064

Objection sustained. Exception.

Testimony closed.

The foregoing case contains all of the evidence taken upon the trial of the action.

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**Opinion on General Issues.**

Law Journal, April 18th, 1916.

By Mr. Justice PENDLETON.

*Appleby, et al. v. City of N. Y., imp'd, et al.*—

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This is an action brought by plaintiffs, owners of certain lands under water, to restrain the city from committing or continuing acts of trespass thereon, and the right to equitable relief is based on the well established doctrine that in order to avoid multiplicity of actions at law, equity will give injunctive relief against continuing trespasses. As inci-

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dent to the principal relief sought plaintiffs ask for a mandatory injunction compelling the removal of certain structures and an accounting of income and wharfage receipts. In order to recover plaintiffs must show continuous acts of trespass or invasion of their rights. They claim title by virtue of two deeds or grants from the city of two certain blocks of land under water on the shore of the Hudson River between Twelfth and Thirteenth Avenues and Thirty-ninth and Fortieth Streets and Fortieth and Forty-first Streets respectively as projected. The deeds purport to grant and convey certain "water lots or vacant ground or soil under water to be made land and gained out of the Hudson or North River" and are in form similar to other so-called water grants which the courts have been frequently called upon to consider and which expressly reserve to the city the title to the land in the projected streets and avenues. No part of plaintiffs' said land acquired under these grants has been filled in, but it is all now covered by the waters of the Hudson River. Thirty-ninth, Fortieth and Forty-first Streets and the lands between those streets have been filled in to a line or point some four feet easterly of the easterly line of Twelfth Avenue and on the land lying westerly thereof, with-

## Opinion

1069

in the projected lines of those streets the city has built shedded and inclosed piers, and it is on the existence of those piers and the use made thereof that the plaintiffs' charges of wrongdoing are predicated. These piers are in whole or large part covered with buildings and cut off from access to the respective streets by fences and gates and are used by the city or its tenants, or those claiming under it or them, as docks or piers for the loading and unloading of boats which for that purpose, approach over the waters adjacent to the piers and congregate along their sides and for such use of the piers the city or its tenants collect dock and wharfage charges and other rents and profits. It is well established that as to lands under navigable waters, all titles of individuals, municipalities and States are held subject to the paramount right of the Federal Government, under its constitutional power to regulate commerce, to appropriate and control them and the waters over them for the public use as part of the navigable waters of the country (*Garrison v. Greenleaf Johnson Lumber Co.*, 215 F. R., 576; *Scranton v. Wheeler*, 179 U. S., 141), and it is undisputed in this case that the waters of the Hudson River are navigable waters and that the Federal Government, in the exercise of this right, has established a bulkhead line along the Hudson River beyond and west of which no construction can be made, excepting only piers out to the pier headline, also established by the Federal Government, and that this bulkhead line crosses the premises claimed by plaintiffs at the distance of 150 feet west of the westerly line of Twelfth Avenue. It is very clear and in fact conceded that any title in plaintiffs was subject to this paramount right of the Federal Government, and that as to so much of the lands as are west of the bulkhead line,

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*Opinion*

established as aforesaid, plaintiffs hold only the naked fee to the land, with the right to build piers thereon under the regulations and conditions prescribed by the Federal Government. As to so much of the premises, therefore, none of the plaintiffs' rights are being invaded, and any basis for injunctive relief as to such part entirely fails. As to the portion of plaintiffs' premises lying east of the aforesaid bulkhead line, no claim is made that they have been set apart or appropriated to public use as navigable waters by either the Federal or State or city governments, so that the question as to the power of the State or city government so to do or whether or not the grant by the State to the city or the city to plaintiffs' predecessors in title was subject to or reserved such power is not here involved. The question, therefore, as to such portion of the premises must depend largely on the construction to be given to the grants under which plaintiffs acquired title. It has been held in numerous cases where similar grants have been construed by the courts that the title to the lands within the street lines remained in the city, and that the title to the remainder of the lands within the grant vested in the grantee, with the right to fill in and make land of them at his pleasure. That the grantee is entitled to fill in at any time was expressly held in *Duryea v. Mayor, etc.* (62 N. Y., 592), where the language of the deed was exactly similar to the grants now under consideration, and this was approved in *Mayor, etc., of N. Y. v. Law, et al.*, 125 N. Y., 380). The right so acquired cannot be taken away by any rules of the dock department. The right to make reasonable rules regulating the method of doing the work cannot be construed so as to substantially deprive grantees of the city of rights passing under their grants. That there may

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## Opinion

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be physical difficulties in filling in by reason of the fact that Twelfth Avenue has not been filled in and cannot be until required by the city is beside the question and need not be considered here. While plaintiffs have therefore the right to fill in at any time the lands between the streets and east of the bulkhead line, not having done so, the waters over the same are still part of the navigable waters of the Hudson River and subject to the right of the public to use the same. Vessels approaching the piers maintained by the city and its lessees for the purpose of loading and unloading pass over and through the same by virtue of such right. So far as they are concerned no other use is shown of these waters or the land lying under them than that of simply navigating such vessels over waters which still belong to the navigable waters of the country. The exercise of this public right to sail over these waters is not an invasion of any right of the plaintiffs. In *Coffin v. Scott*, reported in part in 19 Weekly Digest, 413 (a copy of the opinion in full is annexed to defendant's brief), affirmed without opinion in 102 N. Y., 730, plaintiff, the owner by grant from the city of lands under water in the Hudson River brought suit against the lessee from the city of an adjacent pier at the foot of West Thirty-four Street to recover for the wharfage or use of the pier. By the grant under which plaintiff claimed, title to the land within the street lines was reserved. The complaint was dismissed and on appeal the judgment was affirmed. The following language of the opinion is very pertinent to the conditions existing here: "The plaintiff owns, by virtue of his grant, the land under the waters south of the pier. The defendants show that the waters over those lands are now part of the navigable waters of the Hudson River. Neither the

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## Opinion

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plaintiff nor the person through whom his title is derived has filled in or occupied those lands in any manner, nor have they been used by the defendants in any other mode or way than in approaching the pier for the purpose of unloading their cargoes and lying at the pier while discharging cargoes. The plaintiff has no legal right to exact compensation for the use of the navigable waters of the river. \* \* \*

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No other use is shown of these waters, or of the land under them, than that of simply using them to navigate the defendants' vessels to and from the pier for the purpose of unloading them in their business. No evidence is given to show that the defendants' vessels have been accustomed to lie at anchor in those waters, or to do any other act that would indicate a use of the *soil* belonging to the plaintiff in such a manner as to entitle him to a claim of shipping or anchorage. \* \* \*

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On a correct construction of the grant the reservation or exception is necessarily, we think, of the whole of the pier built within the bounds of Thirty-fourth Street, and the right to use navigable waters on the south side of the present pier until the same are lawfully occupied by other piers or docks, and that plaintiff cannot claim that he is injured by the fact that the city has constructed a pier in Thirty-fourth Street, which it might have required Dunham, its grantees, or his assignees, to have built. Plaintiffs not having any title to the land within the lines of the projected streets, the construction and maintenance of piers and buildings thereon are not violative of any fee rights of plaintiffs, and the lands between the streets not having been filled in, and being still covered by navigable waters open to public use, no right of plaintiffs to light, air and access is invaded." The fair and reasonable construction of

## Opinion

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grants of this character would seem to be that when the lands are filled in the grantee has all the usual easements appurtenant to lands fronting on streets, but until filled in the grantee's title is of a naked fee only, and the waters over the same are part of the navigable waters and open to public use. This is consonant with what would seem to have been the intention of the parties. Certainly until the grantee filled in, in other words, did that which was the real consideration of the grant, they could scarcely have expected to deprive the public of the use of the water. If true that the use by the city for piers of the lands within the lines of projected streets, reserved to it for street purposes, is unauthorized and a purpresture, an action for its abatement must be brought in the name of the People (*Knickerbocker Ice Co. v. Schultz, et al.*, 116 N. Y., 382. An individual, in the absence of special damage to some right of his, cannot maintain such a proceeding (*Barnes v. Midland RR. Terminal Co.*, 193 N. Y., 378; *Dimon v. Shewan*, 34 Misc., 72). The only wharfage right given the grantee under the terms of the grants under consideration was the right to take wharfage on the westerly side of Thirteenth Avenue when constructed. Until constructed no right to wharfage accrued and no right of plaintiff to wharfage has been invaded (*Hastings v. City of N. Y.*, 39 Misc., 728). The grant in that case differed from the one here in that there the grantee was entitled to wharfage from the ends of the streets, while here they are not. The relief, as to that special wharfage, granted in that case is not therefore applicable here. It appears by the evidence that the city has caused dredging to be done on the lands under water belonging to plaintiffs, adjacent to the piers and east

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*Opinion*

of the bulkhead aforesaid, and contemplates continuing, so to do. This is plainly an interference with the soil and a trespass on plaintiffs' property and must be enjoined. So any structures constructed or maintained by defendants which extend or project over plaintiffs' lands or on the water covering the same, as distinguished from boats navigating such waters, are trespasses on plaintiffs' property, and they are entitled to have them removed (*Hastings v. City of N. Y.*, 39 Misc., 728).

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Which structures come within this category can probably be settled by agreement and may be determined on the settlement of the judgment. Findings passed on. Settle decision and judgment on notice.

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**Opinion as to Measure of Damages.**

Law Journal, March 30th, 1917.—PENDLETON, J.

1086

*Appleby and ano. v. City of N. Y., et al.*—In the opinion heretofore filed after the trial it is held that the plaintiffs are entitled to an injunction against further dredging on the lands, under water referred to in said opinion and the hearings since then have been held to enable the parties to present evidence as to damages claimed to have been sustained by plaintiffs by reason of the past trespass on their lands. The burden of proof as to this is on plaintiffs, and I am not satisfied that any damages other than nominal have been legally shown. Plaintiffs contend that by reason of the dredging done by the city the cost of constructing an adequate bulkhead or retaining wall behind which to fill in has been increased in that a more expensive structure will be required. There is evidence tending to show it would be necessary in order to construct a bulkhead or retaining wall on the bulkhead



## Opinion

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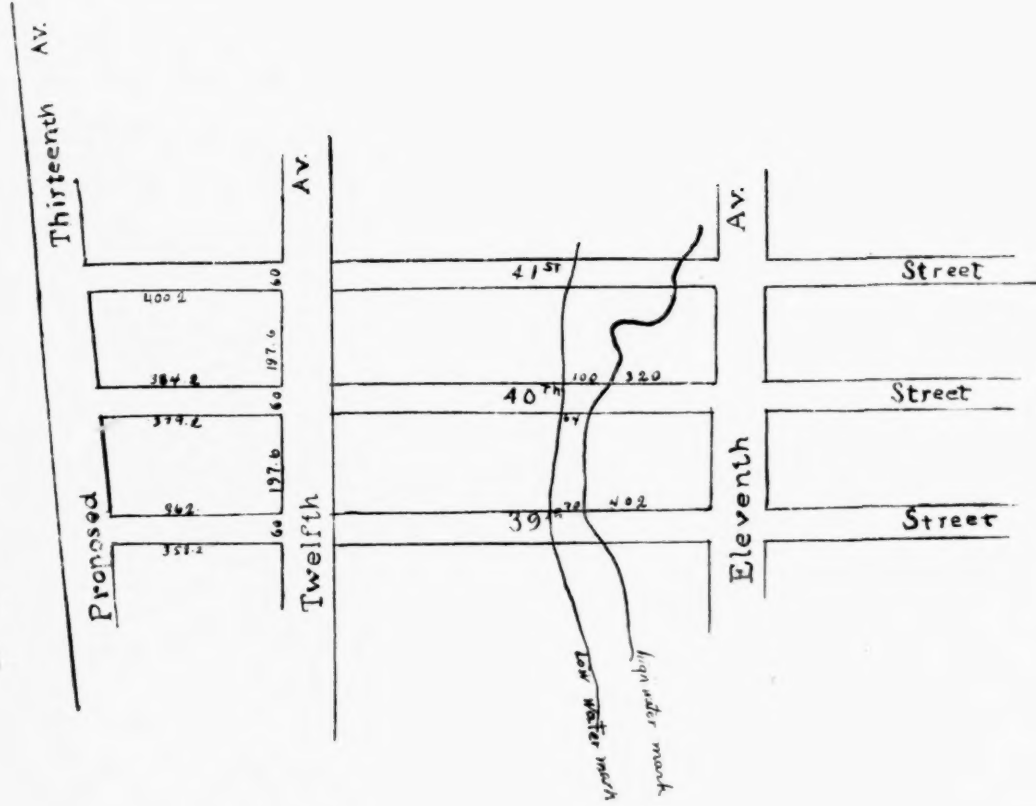
line which would withstand the necessary filling in behind it to remove the top mud, and that the dredging by the city has not therefore increased the size or cost of such a wall. The fact that the existing bulkhead has stood so many years does not conclusively show that a similar one situated 150 feet nearer the centre of the river and the stronger current would prove sufficient. It is quite likely that if the work were to be done now there would be some increased cost due to the dredging. It appears, however, that if the dredging is discontinued, which the injunction will bring about, the land has a tendency to fill up by fresh deposits of mud which may, to some extent at least, offset the effect of the dredging. The plaintiff may not immediately or ever fill in the lands, and when, if he ever does, the part dredged may have filled up in whole or in part. Recoverable damages are those necessarily and naturally resulting from the wrongful acts. The damages claimed by plaintiffs are entirely speculative and uncertain and may or may not occur and do not furnish a proper measure of damages in cases of this kind. The true measure of damages is the difference, if any, between the market value of the land undredged and as it is with the dredging done. No evidence of this was offered. In action for injury to real property the measure of damages is the difference between the market value of the property before and after; that is, with and without the injury (*Argotsinger v. Vines*, 82 N. Y., 308; *Van Deusen v. Young*, 29 N. Y., 9, at page 36; *Berg v. Parsons*, 90 Hun, 267; *Estabrook v. Erie R'y*, 51 Barb., 94; *Agate v. Lowenstein*, 6 Daly, 291; *Hausee v. Hammond*, 39 Barb., 89; *Higgins v. N. Y., L. E. & W. RR.*, 78 Hun, 567; *Francis v. Schoellkopf*, 53 N. Y., 152; *Dwight v. E., C. & N. RR.*, 132 N. Y., 199). In *Argotsinger v.*

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PLAINTIFFS' EXHIBIT NO. 1

HUDSON RIVER.



Map  
Showing a projected Exterior Line  
of the  
City of New York  
extending along the Hudson River  
from  
Hammond Street  
to  
135th Street

New York  
 May 10th 1887  
 Geo. B. Smith  
 City Surveyor

(Map according to Act of  
 Legislature passed April 1885  
 Chap. 112 Sec. 1.)

Plaintiffs'  
 Exhibit "1"



**Plaintiffs' Exhibit No. 2.**

1099

CHAPTER 115 OF THE LAWS OF 1807.

**Plaintiffs' Exhibit No. 3.**

CHAPTER 182 OF THE LAWS OF 1837.

**Plaintiffs' Exhibit No. 4.**

THIS INDENTURE, made the first day of August,  
one thousand eight hundred and fifty-three, Between  
The Mayor, Aldermen and Commonalty of the City  
of New York, of the first part, and CHARLES E. AP-  
PLEBY, of the second part. 1100

WITNESSETH, that the said parties of the first part  
for and in consideration of the sum of Six thousand,  
three hundred and sixty-nine dollars & thirty-seven  
cents, lawful money of the United States of  
America, to them in hand paid by the said party of  
the second part, the receipt whereof is hereby ac-  
knowledged, have granted, bargained, sold, aliened,  
released, and conveyed, and by these presents do  
grant, bargain, sell, alien, release and convey unto  
the said party of the second part, and to his heirs  
and assigns 1101

ALL that certain water lot or vacant ground and  
soil under water to be made land and gained out of  
the Hudson or North River or Harbor of New York,  
and bounded described and containing as follows;  
—that is to say:—

BEGINNING at a point of intersection of the line  
of original high-water mark with the line of the cen-  
tre of Thirty-ninth Street and running thence West-  
erly, along said centre line of Thirty-ninth Street,  
about one thousand and sixty-five feet to the West-

1102

*Plaintiff's Exhibit 4*

erly line or side of Thirteenth Avenue said westerly line or side of the Thirteenth Avenue, being the permanent exterior line of said City, as established by law, thence Northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence Easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a Southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described designated and shown on a map hereto annexed dated New York, June 1853 made by John J. Serrel, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture.

1103

The premises conveyed being colored pink on said map, be the same dimensions more or less.

1104

Saving and reserving from and out of the hereby granted premises, so much thereof, as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues Thirty-ninth and Fortieth Streets for the uses and purposes of Public Streets, Avenues and high-ways as hereinafter mentioned.

TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

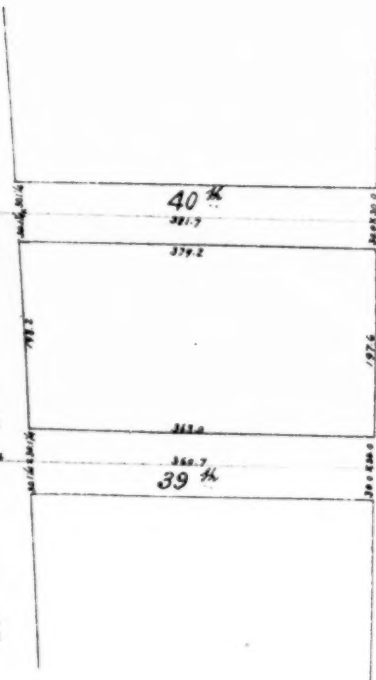
AND also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, of, in and to all the said premises and every part and parcel thereof, with the appurtenances.

# NORTH OR HUDSONS RIVER

Exterior Line established by Law  
1853

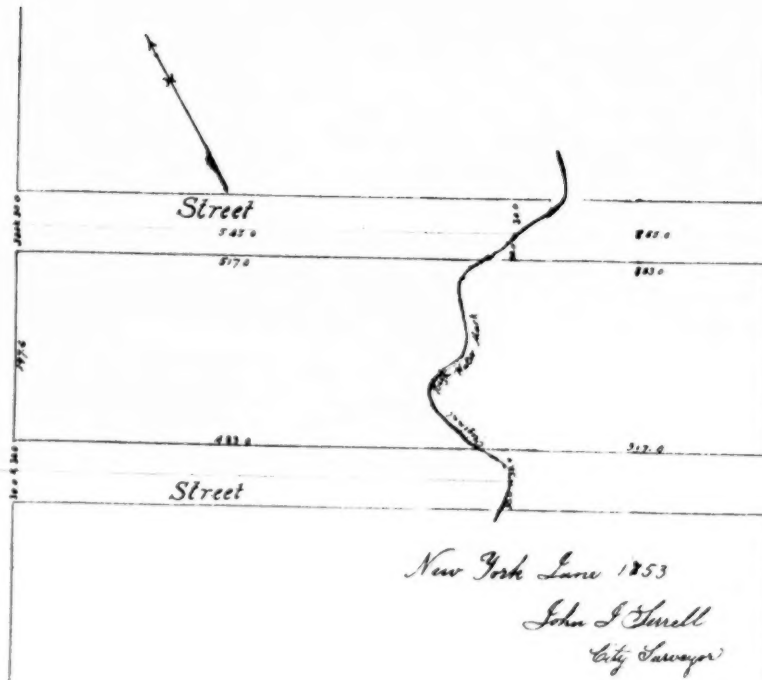
Avenue

13<sup>th</sup>



Avenue

12<sup>th</sup>



Avenue

11<sup>th</sup>

New York Lane 1853

John I. Small  
City Surveyor

*Plaintiff's Exhibit 4*

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TO HAVE AND TO HOLD the said premises hereby granted to the said Charles E. Appleby, his heirs and assigns to his own proper use, benefit and behoof forever.

AND the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted four good and sufficient Bulk-heads, Wharves, Streets and Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Thirty-ninth and Fortieth Streets as fall within the limits of the premises above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

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AND also that the said party of the second part, his heirs and assigns, shall and will from time to time and at all times forever hereafter at his own proper costs charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Thirty-ninth and Fortieth Streets, which the said party of the second part hath covenanted and agreed to make, erect and build as aforesaid, and will at all times forever hereafter obey, fulfill and observe

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*Plaintiff's Exhibit 4*

such ordinances, resolutions orders and directions as the said parties of the first part, and their successors shall from time to time enact and pass or make relative thereto.

1115

1113

AND also that the said streets and avenues shall forever thereafter continue to be and remain public streets and avenues and high-ways for the free and common use and passage of the inhabitants of said City, and others passing and re-passing by through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now use or lawfully ought to be and in case default shall be made by said party of the second part, his heirs and assigns, in building erecting making or finishing the said bulkheads, wharves, streets and avenues by him covenanted herein to be built, erected, made and finished, and in filling in the same or any part thereof, or in complying with any ordinance resolution or order of the said parties of the first part, or their successors when required then, and in that case, it shall and may be lawful for the said parties of the first part or their successors to build, erect, make, or finish the bulk-heads, wharves streets and avenues as aforesaid, and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns, and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof, together with the interest thereon and all costs and charges of the proceedings relative to the same, or to sell and dispose of the said hereby granted premises, or any part thereof, at Public Auction for the most that can be had for the same, and in case of any deficiency to



*Plaintiff's Exhibit 4*

1117

charge with and recover from the said party of the second part, his heirs and assigns, the amount of such deficiency, or to adopt and pursue any legal right or remedy that the said parties of the first part, or their successors now possess, and enjoy under and by virtue of any act of the Legislature of the State of New York, or that may hereafter be granted unto the said parties of the first part, or their successors by the Legislature of the State of New York, or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues, and the right receiving the Wharfage, cramage and profits arising to and from the same, to any other person or persons their heirs, and assigns forever. 1118

AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes, assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully so imposed or levied upon the hereby granted premises under and by virtue of any act or acts, of the Congress of the United States of America, or of the Legislature of the State of New York, or by any act, ordinance or resolution of the said parties of the first part, or their successors. 1119

AND it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said

1120

*Plaintiff's Exhibit 4*

parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose.

1121

AND the said parties of the first part, for themselves, their successors and assigns, do covenant and agree to and with the said party of the second part, his heirs, and assigns that the said party of the second part, his heirs and assigns observing, fulfilling and keeping all and singular the articles covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents, shall and lawfully may from time to time and at all times hereafter fully have, and enjoy take and receive and hold to his own proper use, all manner of wharfage, crantage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City, lying on the Westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever.

1122

Excepting therefrom such wharfage, crantage advantages and emoluments to grow or accrue from the Westerly end of the bulkhead in front of the entire width of the northerly half part of Thirty-ninth Street and the southerly half part of Fortieth Street, which shall be and are hereby reserved for the said parties of the first part, their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

AND it is hereby further agreed by and between the parties to these presents, and the true intent

*Plaintiff's Exhibit 4*

1123

and meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title of interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York,

1124

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition, that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof lawfully entitled to take and receive this grant as the purchaser of the right thereto, from the proprietors of the lands and premises on the easterly side of the premises hereby granted, and adjoining the same, or if the said party of the second part, his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part, and behalf, to be observed, performed, fulfilled and kept, then, and in every such case, these presents and every article clause or thing herein contained shall be and become absolutely null and void.

1125

AND the said parties of the first part, and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted and shall thereafter be seized of the same with the appurtenances free, clear and discharged of, and from any claim, right, or pretence of claim, or right of the said party of the second part, his heirs and assigns anything herein contained to the contrary notwithstanding.

1126

*Plaintiff's Exhibit 4*

AND the said party of the second part, covenants and agrees to pay all expenses which has been incurred by said parties of the first part for regulating the Streets embraced in this grant between the high-water mark, and the permanent exterior line of said City

1127

AND the said party of the second part, for himself, his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that he the said party of the second part, his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants, conditions and agreements, undertakings and provisions herein contained and on his part to be kept, performed and complied with.

1128

IN WITNESS WHEREOF, to one part of these presents remaining with the said parties of the first part, the said party of the second part, hath set his hand and seal and to the other part thereof remaining with the said party of the second part, the said parties of the first part have caused the Common Seal of The City of New York, to be affixed the day and year first above written.

JACOB A. WESTERVELT,

By The Common Council.

D. T. VALENTINE, Clk. C. C. (L.S.)

CITY & COUNTY OF NEW YORK, SS.:

On this 31st day of August, 1853, before me came DAVID T. VALENTINE to me personally known & who being by me duly sworn, did depose & Say; that he resides in the City of New York; that he is the Clerk of the Common Council of The City of

*Plaintiff's Exhibit 4*

1129

New York that the seal affixed to the foregoing instrument is the Corporate Seal of The City of New York, and was affixed thereto by their authority.

CHARLES BURDETT,  
Commr of Deeds.

Recorded the preceding at the request of Varnum, Turney & Co., September 3d, 1853, at 58 Minutes past 12 P. M.

## REGISTER'S OFFICE

1130

COUNTY OF NEW YORK, STATE OF NEW YORK.

I, JOHN J. HOPPER, Register of the said County, have compared the annexed copy with an instrument recorded in this office, on the 3rd day of September A. D. 1853 at 12 o'clock 58 min. P. M. in Liber 638 of Conveyances at page 452 and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

[SEAL]

IN TESTIMONY WHEREOF, I have here-  
unto subscribed my name and official  
seal, this 23rd day of July, 1914.

1131

JOHN J. HOPPER, Register

WILLIAM HALPIN, Deputy Register  
———Asst. Dep. Register

1132

**Plaintiffs' Exhibit No. 5.**

This Indenture made the twenty fourth day of December one thousand eight hundred and fifty two.

Between The Mayor Aldermen and Commonalty of the City of New York, of the first part and Robert Latou of the second part.

1133

Witnesseth that the said parties of the first part for and in consideration of the sum of Four thousand nine hundred and thirty seven 50/100 dollars lawful money of the United States of America to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged have granted bargained sold aliened released and conveyed and by these presents do grant bargain sell alien release and convey unto the said party of the second part and to his heirs and assigns...

All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York and bounded described and containing as follows.

1134

That is to say Beginning at the point of intersection of the line of original high water mark with the line of the centre of Fortieth street and thence running westerly along said centre line of Fortieth street one thousand one hundred and twenty six feet eleven inches to the westerly line or side of the Thirteenth avenue, said westerly side of the Thirteenth avenue being the permanent exterior line of said City as established by law thence northerly along the westerly line or side of the Thirteenth avenue two hundred and fifty eight feet four and a half inches to the line of the centre of Forty first street thence easterly along said centre line of Forty-first street one thousand three hundred and thirty eight feet eleven inches to the line of the or-

North or Hudson River  
 Exterior line as established by <sup>Survey</sup> ~~1814~~ <sup>1812</sup>

*Exterior line as established by Jan 30/12*

13 增

Avenue

214

Avenue

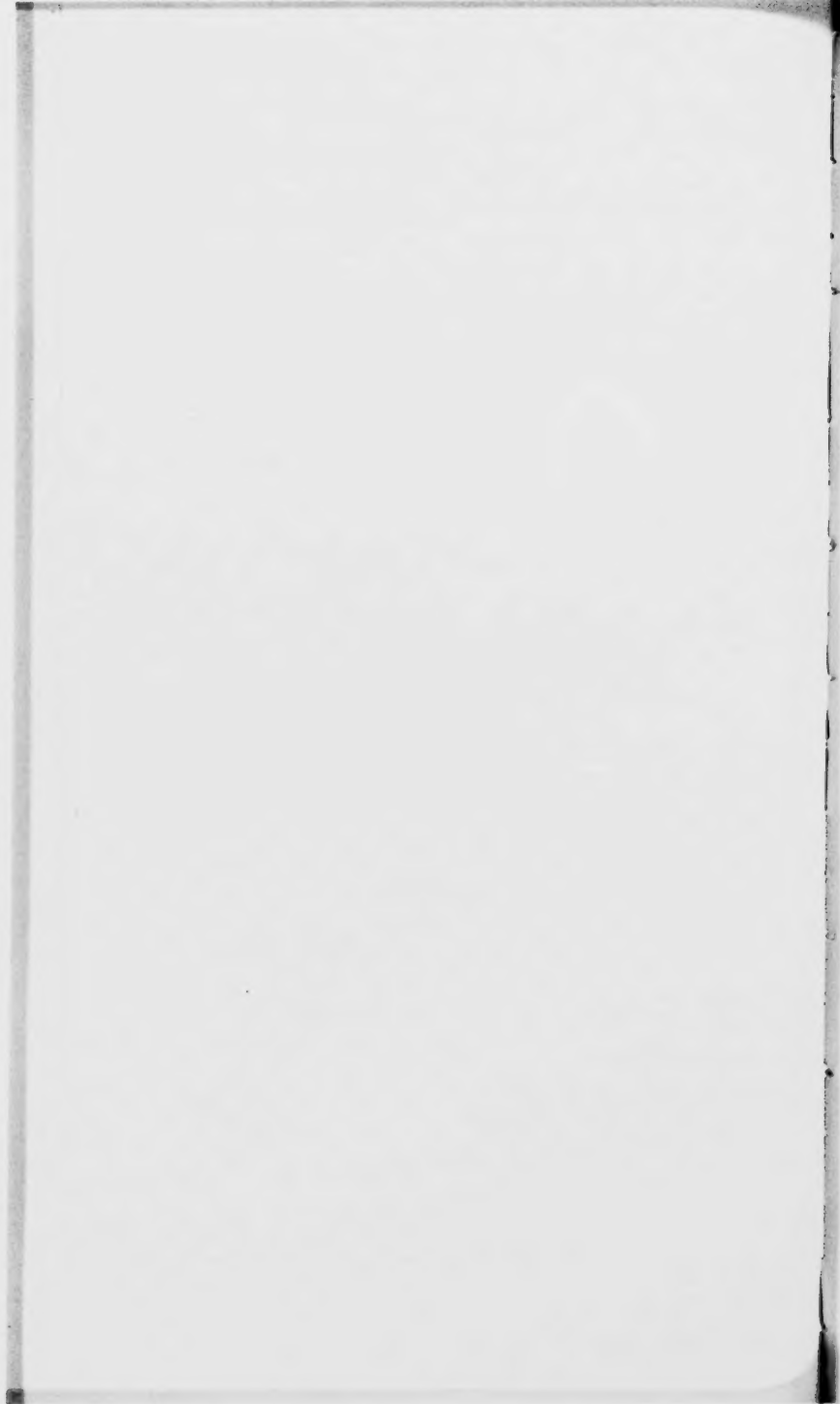
11 班

Avenue

New York December 1852

John I. Sewell

city dweller





*Plaintiff's Exhibit 5*

1141

iginal high water mark and thence in a south west-  
erly direction along said line of original high water  
mark as it runs to the point or place of beginning

As particularly described designated & shown on  
a map hereto annexed dated New York December  
1852 made by John I. Serrell City Surveyor and to  
which reference may be had said map being consid-  
ered a part of this indenture the premises conveyed  
being colored pink on said map

Be the said dimensions more or less Saving and  
reserving from and out of the hereby granted prem-  
ises so much thereof as by said map annexed forms  
parts or portions of the Twelfth and Thirteenth  
avenues and Fortieth and Forty first streets for the  
uses and purposes of public streets avenues and  
highways as hereinafter mentioned.

1142

Together with all and singular the privileges ad-  
vantages hereditaments and appurtenances to the  
same belonging or in any wise appertaining.

AND also all the estate right title interest prop-  
erty claim and demand whatsoever of the said par-  
ties of the first part of in and to the said premises  
and every part and parcel thereof with the appur-  
tenances.

1143

To have and to hold the said premises hereby  
granted to the said Robert Laton his heirs and as-  
signs to his own proper use benefit and behoof for-  
ever.

AND the said party of the second part for him-  
self his heirs and assigns doth hereby covenant and  
agree to and with the said parties of the first part  
their successors and assigns that the said party of  
the second part his heirs and assigns shall and will  
within three months next after he or they shall be  
thereunto required by the said parties of the first

1144

*Plaintiff's Exhibit 5*

part or their successors at his or their own proper costs and charges build erect make and finish or cause to be built erected made and finished according to any resolution or ordinance of the said parties of the first part or their successors already passed or adopted or that may hereafter be passed or adopted four good and sufficient Bulkheads Wharves Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth avenues and Fortieth and Forty first streets as fall  
1145 within the limits of the premises first above described and are reserved as aforesaid from out thereof for public streets.

AND will fill in the same with good and sufficient earth and regulate and pave the same and lay the side walks thereof.

1146

AND Also that the said party of the second part his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth avenues and Fortieth and Forty first streets which the said party of the second part hath covenanted and agreed to make erect and build as aforesaid and will at all times forever hereafter obey fulfill and observe such ordinances Resolutions orders and directions as the said parties of the first part.

AND their successors shall from time to time erect and pass or make relative thereto.

AND also that the said streets or avenues shall forever thereafter continue to be and remain public streets or avenues and highways for the free and common use and passage of the inhabitants of said

*Plaintiff's Exhibit 5*

1147

City and all others passing and repassing by through and along the same in like manner as the other public streets avenues bulkheads and Wharves of the said City now are or lawfully ought to be and in case default shall be made by said party of the second part his heirs and assigns in building erecting making or finishing the said bulkheads wharves streets or avenues by him covenanted herein to be built erected made and finished and in filling in the same or any part thereof or in complying with any ordinance resolution or order of the said parties of the first part or their successors when required then and in that case it shall and may be lawful for the said parties of the first part or their successors to build erect make or finish the bulkhead wharves streets or avenues as aforesaid and to fill in the same and to regulate and pave the same and to lay the side walks thereof at the proper costs and charges of the said party of the second part his heirs and assigns and to charge to and recover in an action at law from the said party of the second part his heirs and assigns the amount thereof together with the interest thereon.

1148

1149

AND all costs and charges of the proceedings relative to the same or to sell and dispose of the whole of the said hereby granted premises or any part thereof at public auction for the most that can be had for the same and in case of any deficiency to charge with and recover from the said party of the second part his heirs and assigns the amount of such deficiency or to adopt and pursue any legal right or remedy that the said parties of the first part or their successors now possess and enjoy under and by virtue of any act of the Legislature of the State of New York or that may hereafter be granted unto the said parties of the first part or

1150

*Plaintiff's Exhibit 5*

their successors by the Legislature of the State of New York or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads wharves streets or avenues and the right of receiving the wharfage cramage and profits arising to and from the same to any other person or persons their heirs and assigns forever.

1151

AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully imposed or levied upon the hereby granted premises under and by virtue of any act or acts of the Congress of the United States of America or of the Legislature of the State of New York or by any act ordinance or resolution of the said parties of the first part or their successors.

1152

AND it is hereby further covenanted and agreed by and between the parties to these presents and the true intent and meaning hereof is that the said party of the second part his heirs and assigns will not build the said wharves bulkheads avenues or streets herein before mentioned or any part thereof or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part or their successors and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part their successor or assigns first had for that purpose.

*Plaintiff's Exhibit 5*

1153

AND the said parties of the first part for themselves their successors and assigns do covenant and agree to and with the said party of the second part his heirs and assigns that he the said party of the second part his heirs and assigns observing fulfilling and keeping all and singular the articles covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents shall and lawfully may from time to time and at all times hereafter fully have and enjoy take and receive and hold to his own proper use all manner of wharfage cranage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River with full power to collect and receive the same for his own proper use and benefit forever.

1154

Excepting therefrom such wharfage cranage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half part of Fortieth street and the southerly half part of Forty first street which shall be and are hereby reserved for the said parties of the first part their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

1155

AND it is hereby further agreed by and between the parties to these presents and the true intent and meaning hereof is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen of said parties of the first part or their successors or to operate further then to pass the estate right title or interest they may

1156

*Plaintiff's Exhibit 5*

have or may lawfully claim in the premises hereby conveyed by virtue of their several Charters and the various acts of the Legislature of the People of the State of New York.

1157

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof seized of a good sure absolute and indefeasible estate of inheritance in fee simple of in and to the lands and premises on the easterly side of the premises hereby granted and adjoining the same or if the said party of the second part his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part.

1158

AND behalf to be observed performed fulfilled and kept then and in every such case these presents and every article clause or thing herein contained shall be and become absolutely null and void and the said parties of the first part and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted shall thereafter be seized of the same with the appurtenances free clear and discharged of and from any claim right or pretence of claim or right of the said party of the second part his heirs and assigns any thing herein contained to the contrary notwithstanding.

AND the said party of the second part covenants and agrees to pay the assessment and the interest due and to grow due thereon for building the sewer in Forty second street assessed upon the premises hereby granted and also to pay all expenses which have been incurred by said parties of the first part

*Plaintiff's Exhibit 5*

1159

for regulating the street embraced in the grant between the High Water Mark and the permanent exterior line of said City.

AND the said party of the second part for himself his heirs and assigns do hereby covenant and agree to and with the said parties of the first part their successors and assigns that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants conditions and agreements undertakings and provisions herein contained and on his part to be kept performed and complied with.

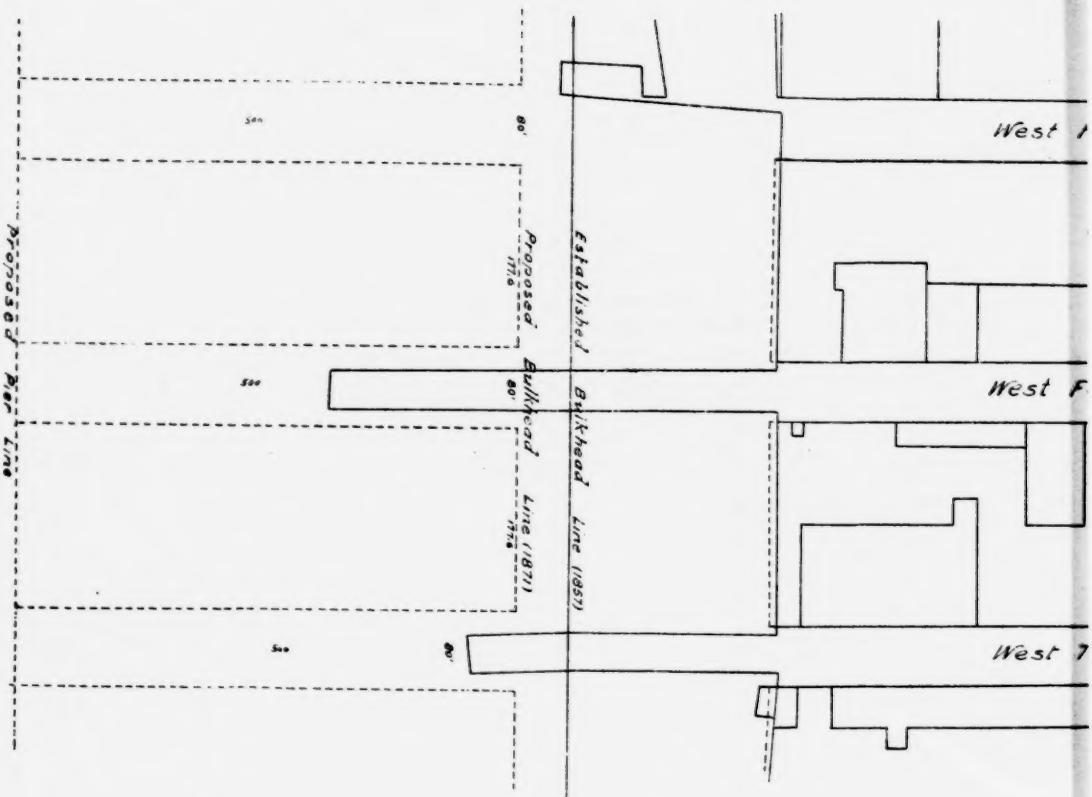
1160

Witnesseth whereof to one part of these presents remaining with the said parties of the first part the said party of the second part hath set his hand and seal and to the other part thereof remaining with the said party of the second part the said parties of the first part have caused the common seal of the City of New York to be affixed the day and year first above written A. C. Kingsland Mayor By the Common Council D. I. Valentine Clk C. C. (LS)

1161

City and County of New York ss on this 30 day of December 1852 before me came David I. Valentine to me personally known who being by me duly sworn deposed & said he is a resident of the City & County of New York that he is the Clerk of the Common Council of said City that the seal affixed to the within grant is the common seal of said City & was so affixed by their authority Geo. L. Taylor Comr of deeds.

Recorded the preceding at the request of R Latou January 3d 1853 at 45 Min past 11 A. M.



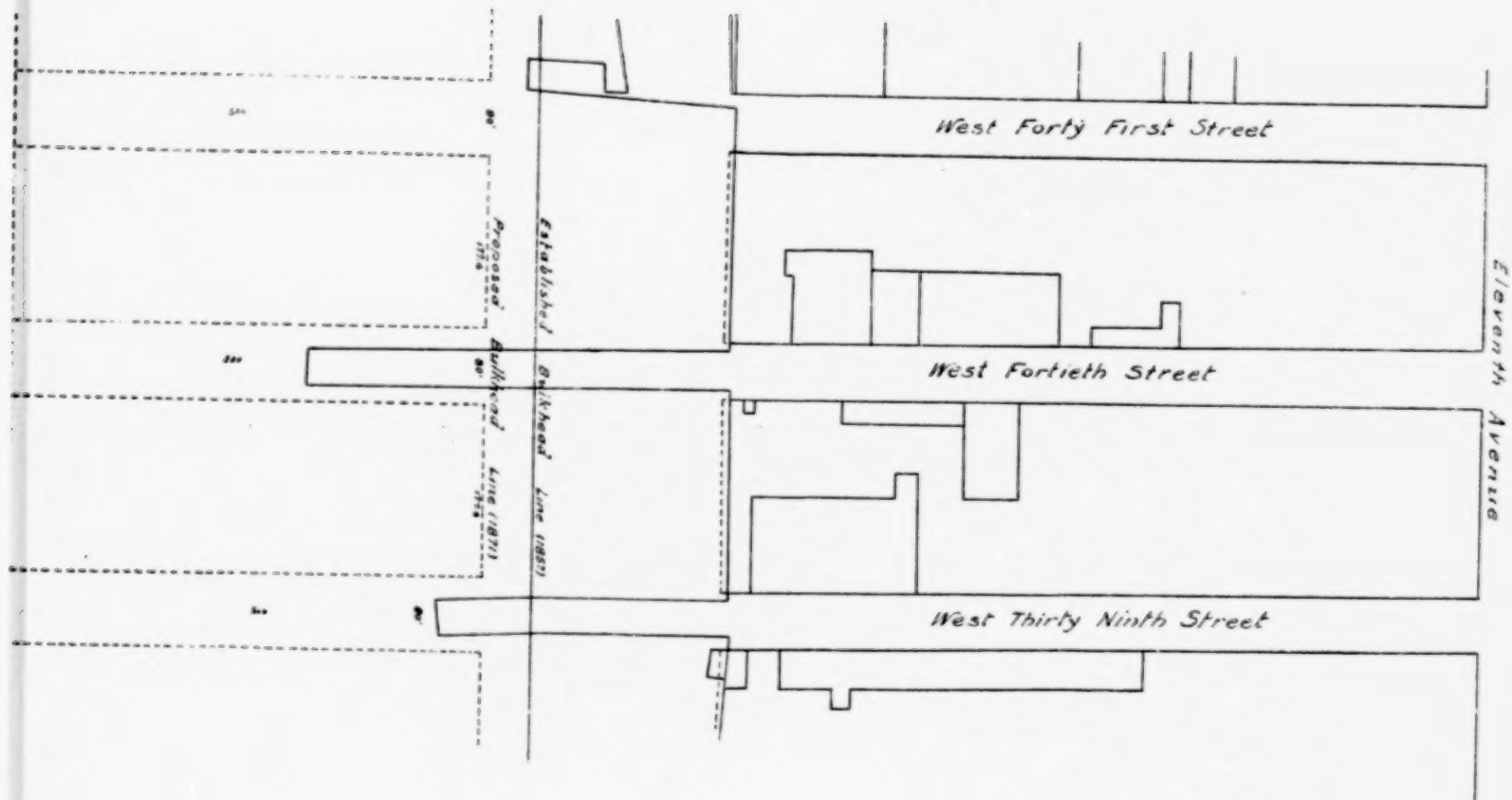
# NORTH RIVER DEPARTMENT OF DOCKS

Sheet No 6  
1870  
Tide 68.  
D  
Scale 500'-1 inch.

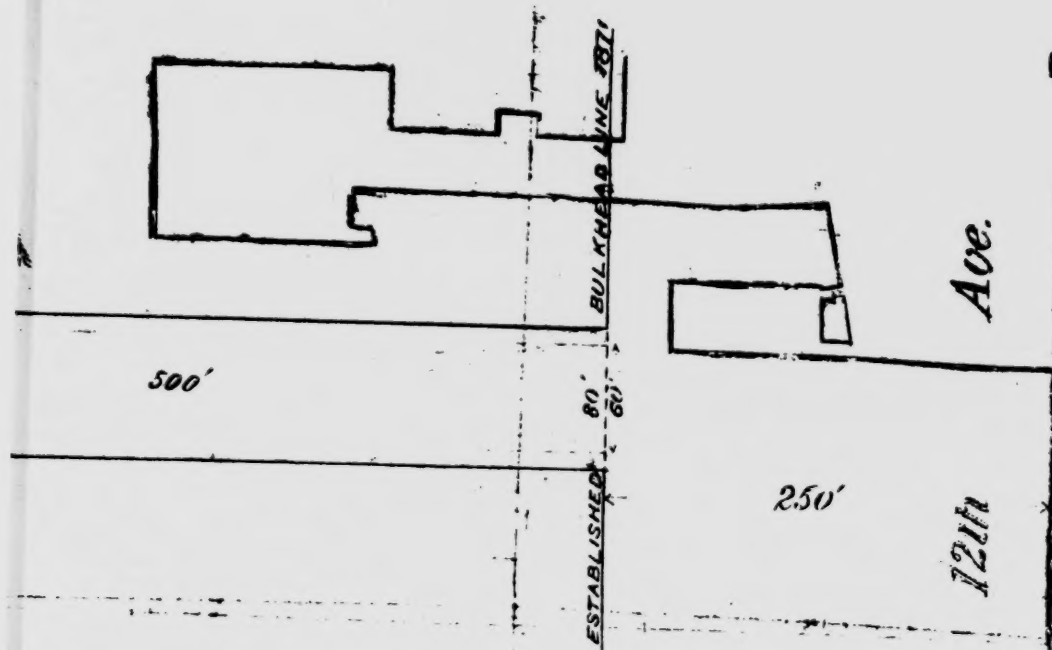
By the Commission of the Sinking Fund of the City of New York, and the Board of the City of New York, authorized upon and transmitted to the Board of Docks of said City and was duly adopted by the Commission of the Sinking Fund of the said City under and pursuant to the provisions of Section 6 of Chap. 514 of the laws of 1871.

New York April 27th 1871.  
J. H. Hackett, Mayor  
Richard D. Connally, Comptroller  
John C. Buckley, Jr. Clerk  
Robert Lytle, Chairman Finance Com.  
Geo. B. Dimes, Chairman Finance Com.









PLAINTIFF'S EXHIBIT No. 12

Scale 1 inch = 50 feet

present structures, October 1884.  
 as determined by the Board of Docks & adopted by the Sinking Fund Commrs, Apr 2<sup>d</sup> 1871.  
 " " proposed " " " " " " Oct. 1<sup>st</sup> 1881.

*L. J. Lucas*  
 Engineer-in-Chief  
*Lambert*  
*Stubbins* } Commissioners  
 of Docks

Red lines  
 Approved at  
 Meeting  
 November 1884,  
 by the  
 Commissioners  
 of the  
 Sinking Fund.

*Franklin D. Ensey* Mayor of the City of New York  
*John W. Hughes* Recorder " " " "  
*Charles F. Smith* Comptroller " " " "  
*Arthur L. Shaw* Chamberlain " " " "  
*Hugh Frank* Chairman of  
 Finance Committee  
 of Board of Aldermen

Tab 93E  
 K

*File 17*

**Plaintiffs' Exhibit No. 12-a.**

1189

SUPREME COURT.

NEW YORK COUNTY.

NOTICE OF APPLICATION FOR THE AP-  
POINTMENT OF COMMISSIONERS OF  
ESTIMATE AND ASSESSMENT.

In the Matter

of

1190

The application of the Mayor, Aldermen and Commonalty of the City of New York, acting by and through the Department of Docks of the City of New York, relative to acquiring right and title to the wharf property rights, terms, easements, emoluments and privileges of and to the land under water necessary to be taken for the improvement of the water front of the City of New York on the North River between 39th and 41st Streets and between 12th and 13th Avenues, pursuant to the plan heretofore adopted by the said Department of Docks and approved by the Commissioners of the Sinking Fund.

1191

Pursuant to Section 715, Chapter 410 of the Laws of 1882, and all statutes in such cases made and provided, notice is hereby given that an application will be made to the Supreme Court of the State of New York, at a Special Term of said Court, to be held at Chambers thereof in the County Court House, in the City of New York, on the 31st

1192

*Plaintiff's Exhibit 12-a*

day of December, 1894, at the opening of the court on that day, or as soon thereafter as counsel can be heard thereon, for the appointment of Commissioners of Estimate and Assessment in the above entitled matters.

1193

The nature and extent of the improvement hereby intended is the acquisition in the name of and for the benefit of the Mayor, Aldermen and Commonalty of the City of New York, for the execution of a certain plan for the improvement of the water front of the City of New York, pursuant to the statutes in such cases made and provided and determined upon by the Department of Docks on the 13th day of April, 1871, adopted and certified by the Commissioners of the Sinking Fund and filed in the office of the Department of Docks on the 27th day of April, 1871, of the lands under water hereinafter described, and all the wharfage right, terms, easements, emoluments and privileges appurtenant thereto and not now owned by the Mayor, Aldermen and Commonalty of the City of New York, namely: All that wharf property, rights, terms, easements, emoluments, privileges and lands under water of the City of New York described as follows:

1194

Beginning at a point formed by the intersection of the westerly side of Twelfth Avenue with the northerly side of Thirty-ninth Street; running thence westerly along the northerly side of Thirty-ninth Street extended to the easterly side of Thirteenth Avenue, as the same was established by Chapter 182 of the Laws of 1837; running thence northerly along said easterly side of Thirteenth Avenue to the southerly side of Fortieth Street; running thence easterly along the southerly side of Fortieth

*Plaintiff's Exhibit 12-a*

1195

Street extended to the westerly side of Twelfth Avenue; running thence southerly along the westerly side of Twelfth Avenue to the northerly side of Fortieth Street, the point or place of beginning.

Beginning at a point formed by the intersection of the westerly side of Twelfth Avenue, with the northerly side of Fortieth Street; running thence westerly along the northerly side of Fortieth Street, extended to the easterly side of Thirteenth Avenue, as the same established by Chapter 182 of the Laws of 1837, running thence northerly along the easterly side of Thirteenth Avenue to the southerly side of Forty-first Street, extended; running thence easterly along the southerly side of Forty-first Street to the westerly side of Twelfth Avenue; running thence southerly along the westerly side of Twelfth Avenue, to the point or place of beginning.

1196

Together with all wharfage, rights, terms, easements, privileges and appurtenances or emoluments of any kind whatsoever, in and to the above described premises and appurtenant to the bulkhead along the westerly side of Thirteenth Avenue, in front of the above described premises.

1197

Dated, New York, December 18, 1894.

WILLIAM H. CLARK,  
Counsel to the Corporation,  
No. 2 Tyron Row,  
New York City.

1198

**Plaintiffs' Exhibit No. 13.****PETITION IN CONDEMNATION.****SUPREME COURT.****COUNTY OF NEW YORK.**

In the matter

of

1199

The application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks of the City of New York, relative to acquiring right and title to, and possession of, the wharf property, rights, terms, easements, emoluments and privileges of and to the lands under water and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River between 39th and 41st Streets and between 12th and 13th Avenues, pursuant to the plan heretofore adopted by the said Department of Docks and approved by the Commissioners of the Sinking Fund.

1200

**PETITION OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, FOR THE APPOINTMENT OF COMMISSIONERS OF ESTIMATE, WILLIAM H. CLARK, COUNSEL TO THE CORPORATION, NO. 2 TYRON ROW, NEW YORK CITY.**

To the Supreme Court of the State of New York, in and for the First Judicial District:

The application and petition of the Mayor, Aldermen and Commonalty of the City of New

*Plaintiff's Exhibit 13*

1201

York acting by and through the Department of Docks, one of the departments of the said Mayor, Aldermen and Commonalty of the said City of New York, respectfully shows:

FIRST.—That pursuant to the provisions of Chapter 410 of the Laws of 1882, entitled "An act to consolidate into one act and to declare the special and local laws affecting public interests in the City of New York," passed July 1, 1882, and specially of Section 715 thereof, and of the several acts of the Legislature amendatory thereof, the said Department of Docks is authorized to acquire, in the name and for the benefit of the Corporation of the City of New York, which is the petitioner above named, any and all wharf property, lands under water and uplands in the City of New York to which the Mayor, Aldermen and Commonalty of the City of New York has no right or title, and any rights, terms, easements and privileges pertaining to any wharf property in the said City and now owned by said corporation either by purchase or process of law, according and in the manner therein provided, if the said Dock Department should deem it proper that said City Corporation should acquire the same, to be taken for the improvement of the water front of the City of New York.

SECOND.—That said Department of Docks, acting for and on behalf of the Mayor, Aldermen and Commonalty of the City of New York, had deemed and still deem it proper, and it has heretofore seemed and still seems necessary for the improvement of the water front of the Mayor, Aldermen and Commonalty of the City of New York to acquire title for the improvement of the water front of the City of New York, and for the use by the



1204

*Plaintiff's Exhibit 13*

public to all the lands under water, wharf property, rights, terms, easements, emoluments and privileges to the lands under water in the City of New York described as follows, to wit:

1205

Beginning at a point formed by the intersection of the westerly side of Twelfth Avenue with the northerly side of Thirty-ninth Street; running thence westerly along the northerly side of Thirty-ninth Street extended to the easterly side of Thirteenth Avenue, as the same was established by Chapter 182 of the Laws of 1837; running thence northerly along said easterly side of Thirteenth Avenue to the southerly side of Fortieth Street; running thence easterly along the southerly side of Fortieth Street extended to the westerly side of Twelfth Avenue; running thence southerly along the westerly side of Twelfth Avenue to the northerly side of Fortieth Street, the point or place of beginning.

1206

Beginning at a point formed by the intersection of the westerly side of Twelfth Avenue with the northerly side of Fortieth Street, running thence westerly along the northerly side of Fortieth Street extended to the easterly side of Thirteenth Avenue, as the same was established by Chapter 182 of the Laws of 1837; running thence northerly along the easterly side of Thirteenth Avenue to the southerly side of Forty-first Street extended; running thence easterly along the southerly side of Forty-first Street to the westerly side of Twelfth Avenue; running thence southerly along the westerly side of Twelfth Avenue to the point or place of beginning.

*Plaintiff's Exhibit 13*

1207

Together with all wharfage rights, incorporeal hereditaments, terms, easements, emoluments, privileges or other appurtenances of any kind whatsoever, appurtenant to said lands under water and appurtenant to the bulkhead along the westerly side of 13th Avenue, in front of the above described premises.

THIRD.—Your petitioners aver upon their information and belief that the lands under water, tenements, hereditaments, rights, terms, privileges, easements, appurtenances and emoluments, more particularly described in paragraph II of this petition were, during the negotiations hereinafter referred to, and still are owned by Charles E. Appleby. 1208

FOURTH.—That the said Mayor, Aldermen, and Commonalty of the City of New York has not now, and at the times hereinafter stated in the fifth paragraph hereof had not any right or title, nor have they now, nor had then at such times aforesaid, to the lands under waters, or to any rights, terms, easements and privileges pertaining to any of the wharfage property hereinbefore described. 1209

FIFTH.—That your petitioners, the Mayor, Aldermen and Commonalty of the City of New York acting through and by said Department of Docks, have negotiated in good faith with the owners of the said land under waters, wharf property and rights, hereinbefore described for the purpose of agreeing with the said owners upon a price for the same, and for the purchase thereof by your petitioners, and that after due diligence no price can be agreed upon between the owners thereof and the said Department of Docks.

1210

*Plaintiff's Exhibit 13*

SIXTH.—That said Department of Docks has heretofore directed the Counsel to the Corporation of the City of New York to take legal proceedings to acquire said property, land under water, rights, terms, easements, emoluments and privileges for the Mayor, Aldermen and Commonalty of the City of New York, the petitioners herein, as will more fully appear by the accompanying communications to said Counsel to the Corporation from said Department of Docks, hereunto annexed and marked Exhibit "A."

1211

SEVENTH.—That the said lands under water, wharf property and the rights, etc., appurtenant thereto, which it is proposed to acquire title to as aforesaid, are shown in the map or diagram attached hereto and as thereon indicated as painted.

1212

EIGHTH.—And your petitioners further show that under and pursuant to Chapter 574 of the Laws of 1871, and the acts of the Legislature hereinbefore mentioned, they did determine, April 13, 1871, upon a plan for that part of the water-front of the City of New York on the easterly side of the Hudson or North River, from the Battery to Sixty-first Street, North River, and did, on or about the 27th day of April, 1871, send the plans so determined upon, together with the documents, specification estimates and particulars, relative thereto, to the Commissioners of the Sinking Fund of the said City of New York, that the said Commissioners of the Sinking Fund of the said City did, on the 27th day of April, 1871, adopt the plan so determined upon and sent to them as aforesaid on the 27th day of April, 1871, and returned the same to your petitioners with certificate of such adoption written thereon, specifying the

*Plaintiff's Exhibit 13*

1213

territory or district which said plan covers and controls, and the said plan has, since the 27th day of April, 1871, been on file in the office of the said Department of Docks.

NINTH.—That the said plan determined upon, adopted, certified and filed as aforesaid provides, among other things, that a marginal public wharf, which, when constructed, will include the said above mentioned property so described in Paragraph II of this petition, should be laid out and established upon and cover a portion of the area thereof.

1214

TENTH.—That the object of said plan is to facilitate the construction of a general and homogeneous system of bulkheads and piers, which shall be under the control of the municipal authorities, and to abolish the present and irregularly constructed private wharves and piers, and that the interests of the public, and that the demands of commerce for that section of the city cover the acquisition of the rights of private owners and the building of a public wharf hereinbefore described, and the acquiring of said property and rights aforesaid. And your petitioners further show that it is in pursuance of the general plan aforesaid for the public use that it is sought to acquire this property in this proceeding and for no other purpose whatever.

1215

ELEVENTH.—And your petitioners further show that they have caused due notice of this application to be published pursuant to law, in the City Record, a daily public official newspaper, printed and published in the City of New York, as will more fully appear by the affidavit of publication of such

1218

*Plaintiff's Exhibit 13*

notice hereunto annexed and they also caused copies of such notice in hand bills to be duly posted in three conspicuous places in said city upon or near said wharf property, lands and premises to be affected or taken by this proceeding, and they generally and perfectly have done and performed all manner of things required of them by law to be done and performed in the premises, as will more fully appear by the affidavits hereto annexed and marked Exhibits B and C.

1217

WHEREFORE, your petitioners pray that this Honorable Court will be pleased in pursuance of the statutes in that behalf made and provided, to nominate and appoint three discreet and disinterested persons, citizens of the United States, as Commissioners of Estimate and Assessment, who shall be authorized and directed to perform the duties in that behalf prescribed in the said statutes by them to be done and performed, concerning the proceeding to acquire the right and title to and possession of the aforesaid lands under water, wharf property, rights, terms, easements, emoluments or privileges, for the Mayor, Aldermen and Commonalty of the said City, the petitioners herein and generally to do and perform all manner of things which are requisite and necessary in the premises to be done and performed.

1218

And your petitioners further pray that the said Commissioners of Estimate and Assessment so to be appointed as aforesaid may be directed to make and submit a report herein to this Honorable Court, without unnecessary delay, and that said Commissioners be authorized, in their discretion, to employ one or more city surveyors to make a survey of the premises to be affected by this proceeding, and to

*Plaintiff's Exhibit 13*

1219

prepare the necessary documents or maps for the use of said Commissioners. And your petitioner will ever pray, etc.

Dated, New York, December 31st, 1894.

WILLIAM H. CLARK,  
Counsel to the Corporation,  
Attorney for the Petitioner.

---

City and County of New York, ss.:

1220

James J. Phelan, being duly sworn, says that he is Treasurer of the Board of Docks and one of the Petitioners herein; that he has read the foregoing petition, and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

JAMES J. PHELAN.

Sworn to before me the  
31st day of December, 1894.

1221

CHARLES J. AVERY,  
Commissioner of Deeds,  
New York County.

1222

*Plaintiff's Exhibit 13*

## EXHIBIT "A."

CITY OF NEW YORK,

DEPARTMENT OF DOCKS.

Commissioners

Edwin A. Post, Pres.

James Matthews, Treas.

J. Sergeant Crane

Pier "A" N. R.

Battery Place

1223

New York, June 13, 1891.

HON. WILLIAM H. CLARK

Counsel to the Corporation.

SIR:

At a meeting of the Board governing this Department held 11th inst., the following Preambles and Resolution were adopted:

1224

"WHEREAS, This Board, on the 29th day January, 1891, adopted preambles and resolutions offering to purchase in the name and for the benefit of the Corporation of the City of New York, the following described property: All the right to the bulkhead and wharf property on the North River, between 39th and 40th Streets (197 feet 6 inches); and between 40th and 41st Streets (197 feet 6 inches); together with all the right to wharfage, cranage, advantages and emoluments, and all the right, title and interest in and to the land under water, and all appurtenances thereof, lying westerly of the westerly line of 12th Avenue, covered by the grants from the City to Charles E. Appleby, August 1, 1853, between West 39th Street and West 40th Street, and to Robert Latou, December 24, 1852, between West 40th and West 41st Street.

*Plaintiff's Exhibit 13*

1225

"WHEREAS, Charles E. Appleby has not notified the Board of his willingness to convey the said rights and interests to the Mayor, Aldermen and Commonalty of the City of New York, in accordance with the terms and conditions of the Resolutions adopted January 29, 1891, although more than ten days have elapsed since the expiration of the time to agree to the same; and

"WHEREAS, This Department deems it proper to acquire immediate title and possession to the premises, hereinbefore described, in the name and for the benefit of the Corporation of the City of New York, and is desirous of acquiring the same for the purpose of carrying out the necessary improvement of the water front in that locality; and

1226

"WHEREAS, It is deemed that no price can be agreed upon between the owners of the said property and this Department, for the purpose thereof; therefore be it

"RESOLVED, That the Counsel to the Corporation of the City of New York be and is hereby requested to institute legal proceedings for the immediate acquisition of said property, rights, terms, easements and privileges for the Mayor, Aldermen and Commonalty of the City of New York, as required by law in such cases made and provided."

1227

Yours respectfully,

EDWIN A. POST,  
President.



1228

*Plaintiff's Exhibit 13*

## EXHIBIT "B."

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

- 1229 The Application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks of the City of New York, relative to acquiring right and title to, and possession of, the wharf property rights, terms, easements, emoluments and privileges of and to the land under water, and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River between 39th and 41st Streets and between 12th and 13th Avenues, pursuant to the plan heretofore adopted by the said Department of Docks and approved by the Commissioners of the Sinking Fund.
- 1230

JOHN J. DONOVAN being duly sworn, deposes and says:

I am a police officer and am detailed to the office of the Counsel to the Corporation.

On the 18th day of December, 1894, I posted notices, a copy of which is hereto annexed, in three

*Plaintiff's Exhibit 13*

1231

conspicuous places adjacent to the property described in said notice.

JOHN J. DONOVAN.

Sworn to before me this  
31st day of December, 1894.

GEORGE LANDON,  
Comm. of Deeds,  
City of New York.

---

EXHIBIT "C."

1232

State of New York,  
City and County of New York, } ss.:

JOHN J. McGRATH being duly sworn says, that he is examiner of the City Record the official Journal of City of New York; that the advertisement hereto annexed has been regularly published in said City Record ten days consecutively commencing the 18th day of December, 1894.

JOHN J. McGRATH.

1233

Sworn to before me this  
31st day of December, 1894.

WASHINGTON H. HETTLER,  
Commissioner of Deeds,  
City of New York.

1234

*Plaintiff's Exhibit 14***Plaintiffs' Exhibit No. 14.****ORDER APPOINTING COMMISSIONERS.**

At a Special Term of the Supreme Court, held in and for the City and County of New York, at Chambers thereof in the County Court House in the City of New York, on the 31st day of December, 1894.

1235 Present—Hon. EDWARD PATTERSON, Justice.

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In the Matter

of

1236

The Application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks of the City of New York, relative to acquiring right and title to, and possession of, the wharf property rights, terms, easements, emoluments and privileges of and to the land under water, and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River between 39th and 41st Streets and between 12th and 13th Avenues, pursuant to the plan heretofore adopted by the said Department of Docks and approved by the Commissioners of the Sinking Fund.

---

The Mayor, Aldermen and Commonalty of the City of New York acting by and through the De-

*Plaintiff's Exhibit 14*

1237

partment of Docks of said City, having, in pursuance of the provisions of Section 715 of Chapter 410 of the Laws of 1882, and all the laws in such case made and provided by William H. Clark, Esq., Counsel to the Corporation of the City of New York, presented to the Supreme Court of the State of New York, in and for the First Judicial District, their certain petition to acquire title to and possession of, for the improvement of the water front of the City of New York and for the use and convening of the public, all the lands under water, wharf property, rights, terms, easements, emoluments and privileges of the lands under water in the City of New York, described as follows, to wit:

1238

BEGINNING at a point formed by the intersection of the westerly side of Twelfth Avenue with the northerly side of Thirty-ninth Street; running thence westerly along the northerly side of Thirty-ninth Street extended to the easterly side of Thirteenth Avenue, as the same was established by Chapter 182 of the Laws of 1837, running thence northerly along said easterly side of Thirteenth Avenue to the southerly side of Fortieth Street; running thence easterly along the southerly side of Fortieth Street extended to the westerly side of Twelfth Avenue; running thence southerly along the westerly side of Twelfth Avenue to the northerly side of Fortieth Street, the point or place of beginning.

1239

BEGINNING at a point formed by the intersection of the westerly side of Twelfth Avenue with the northerly side of Fortieth Street; running thence westerly along the northerly

1240

*Plaintiff's Exhibit 14*

side of Fortieth Street extended to the easterly side of Thirteenth Avenue, as the same was established by Chapter 182 of the Laws of 1837; running thence northerly along the easterly side of Thirteenth Avenue to the southerly side of Forty-first Street, extended; running thence easterly along the southerly side of Forty-first Street to the westerly side of Twelfth Avenue, running thence southerly along the westerly side of Twelfth Avenue, to the point or place of beginning.

1241

Together with all wharfage, rights, terms, easements, privileges and appurtenances or emoluments of any kind whatsoever, in and to the above described premises and appurtenant to the bulkhead along the westerly side of Thirteenth Avenue, in front of the above described premises.

1242

And the said petitioners, having by their said petition prayed that the Honorable Court should be pleased, in pursuance of their said Statutes in such case made and provided, to nominate and appoint three discreet and disinterested persons, being citizens of the United States, Commissioners of Estimate and Assessment for the purpose of performing the duties required by the statutes relative to the premises.

And the Counsel to the Corporation having given due notice that this application would be made to the Supreme Court of the State of New York, at a Special Term of said Court, to be held at Chambers in the County Court House, in the City of New York, on the 31st day of December, 1894, and said motion having been duly and regularly come on to be heard.

NOW, upon reading and filing the petition herein verified on the 31st day of December, 1894, and

*Plaintiff's Exhibit 14*

1243

the affidavit of posting handbills in three conspicuous places adjacent to the premises affected by the proceeding, verified on the same day, and the affidavit of publication verified on the same day, and after hearing Charles Blandy, Esq., Assistant to the Counsel to the Corporation, in support of said petition, in opposition thereto.

NOW, ON MOTION of William H. Clark, Counsel to the Corporation, it is

ORDERED that Lawrence Godkin, John T. Farley and Benjamin Perkins, three discreet and disinterested persons, being citizens of the United States, be and they hereby are nominated and appointed Commissioners of Estimate and Assessment herein. 1244

And it is further ordered that the said Commissioners shall proceed to make a just and equitable estimate and assessment of the loss and damage to the respective owners, lessees, parties and persons respectively entitled unto or interested in the wharfage, rights, wharf property, terms, easements or privileges by and in consequence of the acquisition of the same by the Mayor, Aldermen and Commonalty of the City of New York. 1245

And it is further ordered that the said Commissioners make their report on the premises without unnecessary delay.

And it is further ordered that said Commissioners may in their discretion employ a city surveyor to make a survey of the premises affected by this proceeding and to prepare the necessary documents or maps for the use of said Commissioners.

Enter,

E. P.,  
J. S. C.

1246

*Plaintiff's Exhibit 15***Plaintiffs' Exhibit No. 15.****NOTICE OF HEARING BEFORE COMMISSIONERS.  
N. Y. SUPREME COURT.**

1247

IN THE MATTER OF the application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks, relative to acquiring title to the wharf property, rights, terms, easements, emoluments and privileges of, and to the lands under water and the lands under water necessary to be taken for the improvement of the water front, of the City of New York on the North River, between Thirty-ninth and Forty-first Streets, and between Twelfth and Thirteenth Avenues, pursuant to the plan heretofore adopted by the Department of Docks and approved by the Commissioners of the Sinking Fund.

1248

NOTICE IS HEREBY GIVEN that we, the undersigned, were appointed by an order of the Supreme Court bearing date the 31st day of December, 1894, Commissioners of Estimate and Assessment for the purpose of making a just and equitable estimate and assessment of the loss and damage to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, wharf property, lands under water, wharfage rights, tenements and hereditaments required for the purpose by and in consequence of the acquisition of the same by the Mayor, Aldermen and Commonalty of the City of New York, and more particularly set forth in the petition of the Mayor, Aldermen and Commonalty of the City of New York, filed in the Office of the Clerk of the City and County of New York, and of performing the trusts and duties required of us by Chapter 15, Title 1, and Chapter 16, Title 5, of the Act entitled "An Act to consolidate into one Act and to declare the special and local laws affecting public interests in the City of

*Plaintiff's Exhibit 15*

1249

New York," passed July 1, 1882, and the Acts or parts of Acts in addition thereto or amendatory thereof.

All parties and persons interested in the lands and wharf property taken or to be taken for the said improvement of the water front of the City of New York, or affected thereby, and having any claim or demand on account thereof, are hereby required to present the same, duly verified, to us, the undersigned Commissioners of Estimate and Assessment, at our office, No. 253 Broadway, in the City of New York, Rooms 312 and 313, with such affidavits or other proofs as the said owners or claimants may desire, within twenty days after the date of this notice (May 7th, 1895).

1250

And we, the said Commissioners, will be in attendance at our office on the 9th day of May, 1895, at 2 o'clock in the afternoon of that day, to hear the said parties and persons in relation thereto. And at such time and place, and at such further or other time and place as we may appoint, we will hear such owners in relation thereto, and examine the proof of such claimant or claimants, or such additional proofs and allegations as may then be offered by such owner, or on behalf of the Mayor, Aldermen and Commonalty of the City of New York.

1251

Dated, New York, April 15th, 1895.

LAWRENCE GODKIN,  
JOHN T. FARLEY,  
B. PERKINS,

Commissioners.

GEO. H. BARNES, Clerk.

Endorsed: 39 to 41 Sts. 12 & 13 Avenues.

In the matter of Application of Mayor etc. to condemn lands under water, etc. Notice to appear before Commissioners.

Received May 3rd, 1895.

Mailed May 2nd, 1895.

C. E. A.



1252

**Plaintiffs' Exhibit No. 16.**

CLAIM FILED BY CHARLES E. APPLEBY.

N. Y. SUPREME COURT.

1253

"In the matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks relative to acquiring title to the wharf property, rights, terms, easements, emoluments and privileges of and to the lands under water, and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River between Thirty-ninth and Forty-first Streets and between Twelfth and Thirteenth Avenues pursuant to the plan heretofore adopted by the said Department of Docks, and approved by the Commissioners of the Sinking fund."

1254

I, Charles E. Appleby, claim to be the sole owner of the lands and lands under water above mentioned and referred to, extending from the middle of Thirty-ninth Street to the middle of 41st Street, and from the easterly side of Twelfth Avenue to the westerly side of Thirteenth Avenue between said avenues (subject to the right of the public to use said streets and avenues as public streets or avenues) and of all rights, easements, emoluments and privileges of every name and description connected therewith or appertaining thereto.

Dated, New York, May 6, 1895.

CHARLES E. APPLEBY.

TO LAWRENCE GODKIN, JOHN T. FARLEY & B. PERKINS, Esqs., Commissioners.

*Plaintiff's Exhibit 16*

1255

STATE OF NEW YORK,  
CITY AND COUNTY OF NEW YORK, } ss.:

Charles E. Appleby, being duly sworn saith that  
the above claim is just and true.

CHARLES E. APPLEBY.

Sworn before me this 7th }  
day of May, 1895. }

HENRY R. HAM,  
Notary Public, Queens Co.

1256

Cert. filed in N. Y. Co.

ENDORSEMENTS

39 to 41 Sts. 12 to 13 Aves.

Claim of C. E. Appleby

Original delivered to Clerk of

Commrs. May 7, 1895.

CEA

May 9, 1895 attended Commrs. with Mr.  
Blaney, as my counsel.

1257

Mr. Lawrence Conolley, Asst. Corpn. Counsel,  
stated that the City would not proceed at present  
—as the dock department had not the funds with  
which to pay.

CEA

1258

**Plaintiffs' Exhibit No. 17.****LEDGER OF COMMISSIONERS OF ESTIMATE AND APPRAISAL.**

In re 39th and 41st Streets,

1904.

NORTH DAVEN.

December 18th.—First publication of notice of application for the appointment of commissioners. Bill posters posted by J. J. Donovan.

December 31st.—Application made. Petition and accompanying papers verified.

1895:

1259

February 13th.—Petition and papers filed. Order signed 12/31/94, Patterson, J., and entered, appointing Lawrence Godkin, Benjamin Perkins and John T. Farley, Commissioners.

February 14th.—Oath of office taken by Messrs. Godkin and Perkins.

February 18th.—Oath of office taken by Mr. Farley.

February 19th.—Oath of Commissioners filed in County Clerk's office.

April 15th—Commissioners met and organized by electing Lawrence Godkin, Chairman, George H. Barne, Clerk and George A. Haynes, Stenographer. Commissioners sent notice to present claims on or before May 7th and fixed the date of the first meeting on May 9th, 2 P. M., and agreed to view the property at 10 A. M. Saturday, April 20th.

1260

April 17th.—Notice published in City Record.

May 7th.—Claim of Chas. E. Appleby filed with Commissioners.

May 9th.—Commissioners met, Chas. E. Appleby appeared in person, asking for an adjournment in order to obtain counsel. Adjourned to May 20th, 3 P. M.

May 20th.—Commissioners met and adjourned to June 12th.

June 12th.—Commissioners met and adjourned subject to the call of chairman.

**Plaintiffs' Exhibit No. 18.**

1261

**BOARD OF ESTIMATE AND  
APPORTIONMENT.  
CITY OF NEW YORK**  
(500)

WHEREAS, It is the opinion of the Board of Estimate and Apportionment of The City of New York that the public interest requires the discontinuance of the proceeding entitled:

“SUPREME COURT—COUNTY OF NEW YORK.

“In the matter of the application of the Mayor, Aldermen and Commonalty of the City of New York, acting by the Department of Docks of the City of New York, relative to acquiring right and title to and possession of the wharf property, rights, terms, easements, emoluments and privileges of and to the lands under water and the lands under water necessary to be taken for the improvement of the water front of the City of New York on the North River, between Thirty-ninth and Forty-first Streets and between Twelfth and Thirteenth Avenues, pursuant to the plan heretofore adopted by the said Department of Docks and approved by the Commissioners of the Sinking Fund;”

1262

1263

in which proceeding Commissioners of Estimate and Assessment were appointed by an order of the Special Term of the Supreme Court of the State of New York, held at the County Court House in the City of New York on the 31st day of December, 1894, and which order bears date on said day and was filed and entered in the office of the Clerk of the County of New York on February 13, 1895; therefore, be it

RESOLVED, That this Board, pursuant to authority vested in it by Section 1000 of the Greater New York Charter, hereby discontinues said proceeding.

1264

**Plaintiffs' Exhibit No. 19.****DEPARTMENT OF DOCKS AND FERRIES**

New York, 7th June, 1907

O. 5875

B. O. 5326

Mr. William Lansing Jr

Asst Engineer

Sir:—

- 1265 You will please superintend the erection and maintenance of Dumping Board, with necessary runway, scale house, tool house and shelter for workmen, on that portion of the northerly side of Pier foot of 39th Street, North River, commencing at the inshore end of the space occupied by the Offal Contractor (being about 354 feet easterly from the outer end of said pier, and extending easterly a distance of 277 feet); permission having this day been granted the New York Horse Manure Transportation Company; said dumping board and structures to remain thereat during the term of the lease dated June 6, 1907, of the premises above
- 1266 described, granted said Company by the Commissioner and approved by Sinking Fund June 5, 1907, or any renewal thereof; to be used exclusively for dumping manure.

Very respectfully,

CHAS. W. STANIFORD,  
Engineer-in-Chief.

*Plaintiff's Exhibit 19*

1267

West 57th St. Office,  
September 25th, 1907.

O. 5875

B. O. 5326

SUBJECT—ERECTION AND MAINTENANCE  
OF DUMPING BOARDS, ETC., PIER FT.  
39TH ST., N. R.,

C. S. Staniford, Esq.,  
Engineer-in-Chief,

Sir:

In obedience to the above order, I beg to advise you that I superintended the erection and maintenance of Dumping Board, with necessary runway, scale house, tool house and shelter for workmen, on that portion of the northerly side of Pier foot of 39th Street, North River, commencing at the in-shore end of the space occupied by the Offal contractor (being about 354 feet easterly from the outer end of said pier, and extending easterly a distance of 277 feet);

permission having June 7/07 been granted the New York Horse Manure Transportation Company.

Work was begun July 24th, 1907, completed September 23rd, 1907.

Very respectfully,

WM. LANSING, JR.,  
Assistant Engineer.

File

F.T.E.

Endorsed on back:

B. O. 5326

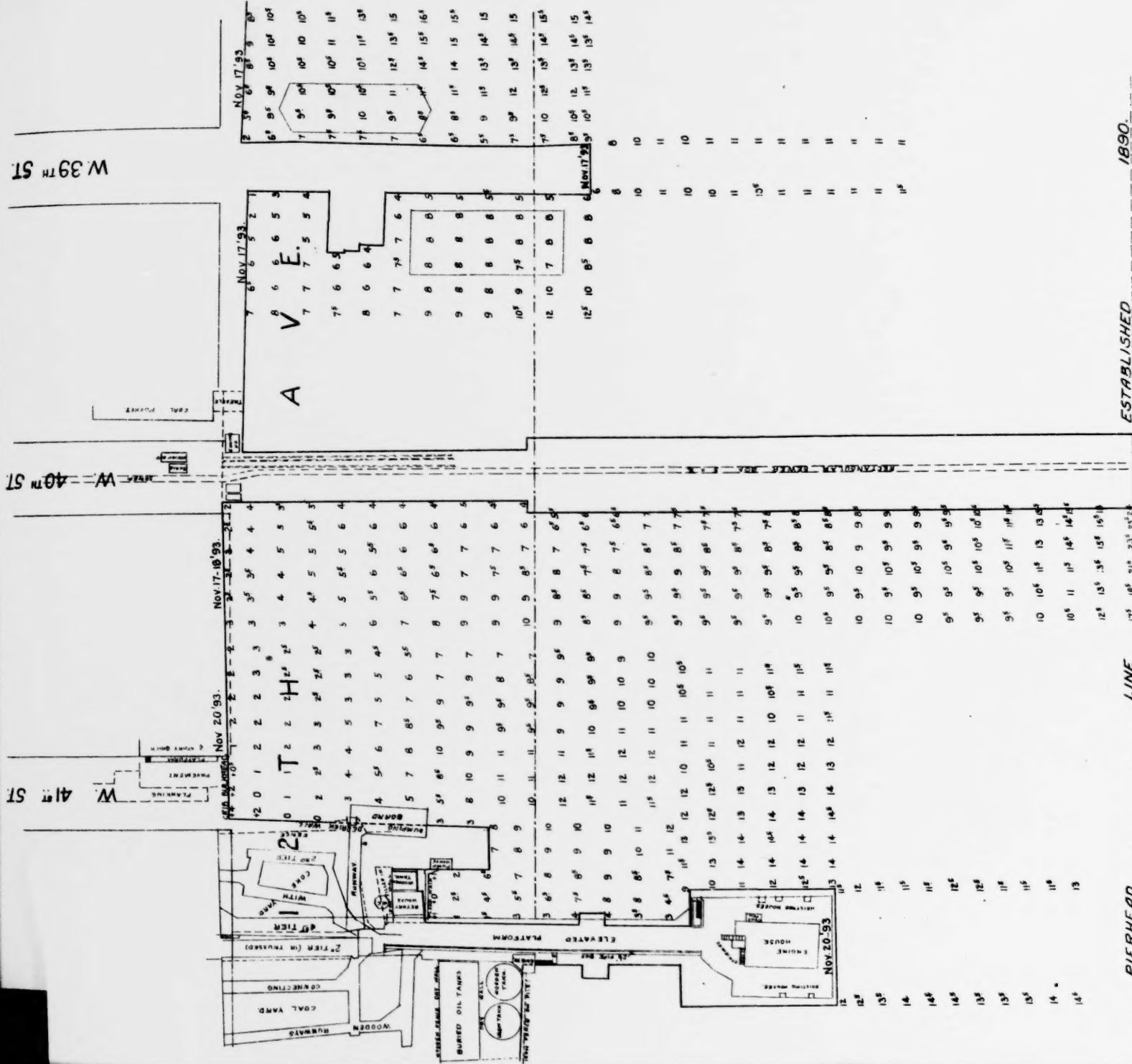
PIER WEST 39th STREET, N. R.,

Supt. erection of dumping board &c by the N. Y.  
Horse Manure Transportation Co.

June 7, 1907.

Sept. 27, 1907

W.L.Jr.



PIERHEAD LINE ESTABLISHED 1890

Plaintiffs Exhibit No. 20

Extract from  
SOUNDING MAP 28, - 1893  
of the  
DEPARTMENT OF DOCKS & FERRIES.  
Scale 1"=50.





**Plaintiffs' Exhibit No. 21.**

1279

CONTRACT No. 660 of the Department of Docks and Ferries for preparing for and building a new pier in West 39th Street, North River, in the Borough of Manhattan, dated July 25, 1899, duly signed and acknowledged August 3, 1899. The contract calls for the construction of a pier and pier approach. The pier to be 60 feet wide and 700 feet long and the pier approach 40 feet wide, beginning at the Easterly side of Twelfth Avenue.

1280

**Plaintiffs' Exhibit No. 22.**

DEPARTMENT OF DOCKS AND FERRIES.

New York, 15th August 1899

O. 20335

Mr. Chandler Davis

Asst. Engineer.

Sir:

Under the authority given by the agreement contained in Contract No. 660, awarded to H. L. Spearin for preparing for and building a New Pier at the foot of West 39th Street, North River, in the Borough of Manhattan, you are hereby designated as the officer to inspect the work to be done under the said contract and to see that the same strictly corresponds with the specifications set forth in said contract and to have general charge of all the work to be done under said contract.

1281

You will please report to me in writing immediately upon the commencement of this work that it is begun and again immediately upon its completion, that it is finished.

Very respectfully,

Your Obedient Servant,

J. A. BENSEL,

Engineer-in-Chief.

1282

*Plaintiff's Exhibit 22*

## DEPARTMENT OF DOCKS AND FERRIES.

Engineer's office  
Foot West 10th Street,

New York, August 22nd, 1899.

J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:

I beg to report that Henry L. Spearin, Contractor,  
for the building of new pier at Foot of West 39th  
1283 Street, North river, under Contract 660, began work  
on the 21st inst.

Very respectfully,

Your obedient servant,  
WM. S. WHITE,  
Asst. Engineer.

See report to Board dated August 22nd, 1899.

FILE

HCG

1284

Endorsed on back:

Pier 39th Street, North River

Reports commencement of work of building new  
pier by H. L. Spearin under Contract No. 660

Aug. 22nd '99

W.S.W.

New York, January 4, 1900

O. 20335

J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:

In obedience to the within order I have super-  
intended the construction of a pier by H. L. Spearin  
under contract 660, at the foot of W. 39th St., N. R.,

*Plaintiff's Exhibit 22*

1285

and have to report that the same was completed on January 3, 1900, in substantial accordance with the specifications.

Very respectfully,

Your obedient servant,  
CHANDLER DAVIS,  
Assistant Engineer.

See report to Board dated 4th January, 1900.

FILE

1286

H. C. T.

Endorsed on back

ENGINEERS ORDER

PIER W. 39th STREET, NORTH RIVER.

Designated as officer to inspect work of building new pier by H. L. Spearin, under Contract No. 660, and reports dates of commencement and completion.

Aug. 15th, '99.

Jan. 4th, 1900.

C. D.

1287

1288

**Plaintiffs' Exhibit No. 23.**

DEPARTMENT OF DOCKS AND FERRIES.

New York, June 6, 1902.

O. 388

C. O. 376

Mr. J. G. Basinger,  
Asst. Engineer.

Sir:—

You will please proceed with the widening of the approach at the south side of the West 39th St. pier, the work to be done by day's labor, and without contract in accordance with my recommendation on Commissioner's Order 301, said Commissioner's Order 301, having been cancelled on 4th inst. by the Commissioner.

Very respectfully,

Your Obedient Servant

J. A. BENSEL,

Engineer-in-Chief.

Foot West 10th Street,

July 23rd, 1902.

O. 388

C. O. 376.

1290 J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:

I beg to report that under the above order I have widened approach to Pier Foot West 39th Street, North river, at the south side.

The work was begun on the 6th June and completed on the 22nd July, 1902.

Very respectfully,

Your Obedient Servant,

J. G. BASINGER

FILE

Asst. Engineer.

H. C. T.

Endorsed on back.

C. O. 376

39th Street Pier, N. R.

*Plaintiff's Exhibit 23*

1291

Proceed with widening approach at south side of  
June 6, 1902. July 23, 1902.

J. G. B.

DEPARTMENT OF DOCKS AND FERRIES.  
Foot West 10th Street,

New York, July 23rd, 1902.

J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:—

1292

I beg to report that I have completed the work of  
widening approach to Pier Foot West 39th street.

Very respectfully

Your obedient servant,  
J. G. BASINGER,  
Asst. Engineer.

See report to Commr., dated 24 July, '02.

File H. C. T.

Endorsed on back  
PIER 39TH ST., NORTH RIVER.

1293

Reports completion of work of widening approach  
to, and also reports laying off of Pile Driving gang

July 23, 1902.

J. G. B.

1294

**Plaintiffs' Exhibit No. 24.**

(Same as Exhibit No. 19.)

**Plaintiffs' Exhibit No. 25.****DEPARTMENT OF DOCKS AND FERRIES.**

New York, 20th September, 1899.

O. 20420.

S. O. 19482.

W. E. Belknap, Esq.,

1295

Ass't Engineer.

Sir:—

You will please order dredging in the half-slips adjoining the pier now building at the foot of West 39th street, North river, under contract No. 662, to a depth of 15 feet at mean low water.

Very respectfully,

Your obedient servant,

J. A. BENSEL,

Engineer-in-Chief.

1296

New York, January 31, 1900.

O. 20420

S. O. 19482

J. A. BenseL, Esq.,

Engineer-in-Chief.

Sir:—

In accordance with the within order I have ordered dredging in the half slips both sides Pier foot of W. 39th street, N. R. Work was begun on January 2 and finished on January 19th, 1900, by the DuBois Bros. Dredging Co. under contract 662. 25,518 cu. yds. of material were excavated and re-

*Plaintiff's Exhibit 25*

1297

moved, and an average depth of about 15½ ft. was made over the area dredged.

Very respectfully,

Your obedient servant,

W. E. BELKNAP,  
Assistant Engineer.

OK

BB

P. S. Tracing attached showing soundings after dredging. 1298

File

H. C. F.

Endorsed on back.

S. O. 19482

Pier at 39th St., N. R.

Order Dredging thereat. Work was done by the DuBois Dredging Co. under Cont. No. 662.

Sept. 20/99.

January 31-1900.

W. E. B.

1299

Mr. Belknap.

In relation to the time of doing this work please confer with the Engr. in charge of the 39th St. pier and in that the work is done soon not to interfere in any way with the Contractor building the pier.

JAB.

1300

**Plaintiffs' Exhibit No. 26.**

CONTRACT No. 231 of the Department of Docks for removing the existing pier in West 40th Street, North River, and for preparing for and building a new wooden pier and approach at the foot of said street, being work of construction under new plan. The new pier is to be about 503 feet 1½ inches in length and to extend from the established bulkhead line. The width to be 60 feet. The approach is to be 40 feet wide and its centre line is to be the centre line of the new pier extending Easterly. The approach will extend from the Easterly or inshore end of the new pier to the crib bulkhead in 40th Street, North River, and its length over all is to be 255 feet.

1301

1302



**Plaintiffs' Exhibit No. 27.**

1303

DEPARTMENT OF DOCKS AND FERRIES.

September 21, 1911.

O. 11790

B. O. 9971

Mr. Wm. Lansing, Jr.,  
Asst. Engineer.

Sir:—

You will please supervise construction of shed on pier foot of West 40th Street, North River, by the Central Railroad Company of New Jersey. On April 26, 1911, the company was notified, in accordance with my recommendation of April 18, 1911, that its plans showing style of construction were approved by me and that it would be necessary for said company to submit its plans to the Municipal Art Commission for approval. No work is to be done by the company in connection with construction of the shed until the plans shall have been approved by the Art Commission.

1304

In letter dated May 5, 1911, the company stated it was then sending plans to the Art Commission for approval.

1305

Very respectfully,

CHAS. W. STANIFORD,  
Chief Engineer.

O. 11790

B. O. 9971

1306

*Plaintiff's Exhibit 27*

West 57th St. Office,

June 24th, 1912.

SUBJECT—CONSTRUCTION OF SHED ON  
PIER FOOT OF WEST 40TH STREET,  
NORTH RIVER—CENTRAL R. R.  
CO. OF N. J.

C. W. Staniford, Esq.,  
Chief Engineer.

Sir:—

1307

In obedience to the above order, I beg to advise you that I supervised construction of shed on pier foot of West 40th Street, North River, by the Central Railroad Company of New Jersey, in accordance with plans.

Work was begun September 20, 1911; finished June 21, 1912.

Under Special Order No. 78, dated March 1, 1912, I beg to advise that the cost of constructing said shed was \$77,400.00.

1308

Very respectfully,

H. C. CALKINS,

File

Assistant Engineer.

HCT

CET.

Endorsed on back.

B.O. 9971

Pier at

40th Street,

North River.

Superintend construction of shed on pier by the  
CENTRAL RAILROAD CO. of NEW JERSEY  
with the consent of the MUNICIPAL ART COM-  
MISSION.

September 21, 1911.

June 24, 1912.

H. C. C.

**Plaintiffs' Exhibit No. 28.**

1309

27th January, 1912.

**SUBJECT: COMPLETION OF THE EXTENSION OF THE PIER FOOT OF 40TH STREET, NORTH RIVER.**

Hon.:—Calvin Tomkins,  
Commissioner of Docks.

Sir:—

I beg to report that the extension to the pier at the foot of 40th Street, North River, is now completed, and it is recommended that the Central Railroad Co. of New Jersey, be notified to take possession of the outer 700 feet of this pier, pursuant to the terms of the lease.

1310

Very respectfully,

.....  
Chief Engineer.

File B

Sw rep D Comm'r

27 Jany/12

1311

/BK

96119

Copy for Chief Engineer.

January 30, 1912.

Central Railroad Company of New Jersey,  
143 Liberty Street,  
New York City.

Gentlemen:—

Referring to the lease of the outer 700 feet of the pier foot of West 40th Street, North River, Borough of Manhattan, to you under indenture dated the 17th day of August, 1909, I beg to advise you that

1312

*Plaintiff's Exhibit 28*

the work of extending the pier out to the pierhead line established by the Secretary of War in 1897 has been completed and the outer 700 feet of the pier is now ready for your occupation.

By direction of the Commissioner, you are hereby notified to take possession of the outer 700 feet of the pier on February 1, 1912, under the lease granted to you, which lease is hereby made to begin on the said date—February 1, 1912.

1313

The permit granted to you for the use of the surface of the pier in connection with shed construction work thereat is hereby revoked by direction of the Commissioner to take effect at the close of the day January 31, 1912, as your occupation of the premises thereafter will be under the lease.

Yours very truly,

F. J. R.,

Ass't Secretary.

CM Calkins

C. C. C.

1314

File B

Endorsed on back

Pier 40th St., N. R.

Copy of report regarding completion of extension to—and recommends that the Central R. R. Co. of New Jersey be notified to take possession of outer 700 feet of this pier, pursuant to the terms of their lease.

Also copy of letter from the Asst. Secretary to above Company.

(Jan. 30, 1912.)

January 27, 1912.

C. W. S.

**Plaintiffs' Exhibit No. 29.**

1315

**DEPARTMENT OF DOCKS.**

New York, 30th November, 1894.

O. 14842

S. O. 14452

Mr. F. P. Thompson,  
Surveyor.

Sir:—

You will please order dredging on both sides of Pier foot of 40th Street, North River, under Contract No. 478, in accordance with the request of the Union Stock Yard and Market Co. of the 24th inst.

1316

Very Respectfully,

Your Obedient Servant,

G. S. GREENE, JR.,

Engineer-in-Chief.

**SURVEYOR'S OFFICE****PIER "A" NORTH RIVER**

New York, 4th January, 1895.

1317

O. 14842

S. O. 14452.

G. S. GREENE, JR., ESQ.,  
Engineer-in-Chief.

Sir:—

In obedience to the within order, I have inspected the work of dredging in the half-slips adjoining the Pier at 40th Street, North River.

The work was commenced on 6th December, and finished 31st December, 1894, by P. Sanford Ross, contractor, under Contract 478.

64992 cubic yards of material was excavated and removed, and a depth of 20 feet of water, at mean

1318

*Plaintiff's Exhibit 29*

low water, was obtained in the half-slips adjoining,  
and Approach.

Very respectfully,

Your obedient servant,

F. P. THOMPSON,  
Surveyor.

File  
GN

1319

Endorsed on the back

S. O. No. 14452

Pier at 40th St., N. R.

Dredge under Contr. No. 478.

Request of Union Stock Yard and Market Co.

30 Nov '94.

4 Jany '95

F. P. T.

---

**Plaintiffs' Exhibit No. 30.**

1320

CONTRACT No. 771 for approach for and building a new pier with appurtenances at 41st Street, North River, in the Borough of Manhattan. The contract is dated July 25, 1904. Work was commenced under this contract July 25, 1904, and finished November 26, 1904. Pier is to be 60 feet wide and 954 feet long. Of this total length, 700 feet out-shore from the established bulkhead line shall be known as "Pier" and remaining about 254 feet in-shore of the bulkhead line shall be known as the 41st Street "Approach."

**Plaintiffs' Exhibit No. 31.**

1321

Department of Docks and Ferries.

O. 3207                      New York, 1st February, 1905.

B. O. 3035

Mr. J. G. Basinger,  
Asst. Engineer.

Sir:—

You will please direct and superintend the construction of a Shed on the West 41st Street Pier, North River, in accordance with plans submitted by E. E. Olcott, lessee of the Pier, said plans having been approved by the Commissioner on the 27th January, 1905. 1322

Very Respectfully,

Your Obedient Servant,

J. A. BENSEL,  
Engineer-in-Chief.

O. 3207                      New York, Aug. 30, 1905. .

B. O. 3035

J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:

In obedience to the within order, I beg to report that I have superintended the construction of a shed on the West 41st Street Pier, North River, by E. E. Olcott. 1323

The work was begun Mar. 16, and finished Aug. 26, 1905.

Very respectfully,

WM. LANSING, JR.,

File H. C. G.                      Asst. Engineer.

Endorsed on the back

B. O. 3035

41st Street, N. R.

Supt. construction of shed on pier at—by E. E. Olcott.

Feb. 1, 1905.

Aug. 30, 1905.

W. L. Jr.

1324

**Plaintiffs' Exhibit No. 32.****DEPARTMENT OF DOCKS AND FERRIES.**

O. 3247. New York, 1st March, 1905.

Mr. Charles E. Trout,  
Asst. Engineer.

Sir:—

1325

You will please proceed with the work of dredging along the southerly side of the inshore end of the pier at the foot of 41st Street, N. R., to a depth of 15 feet at mean low water, in order to enable the Consolidated Gas Co. to operate a dumping board thereat, pursuant to an agreement entered into between said Company and The City; and the work to be done under Contract No. 880.

Very respectfully,

J. A. BENSEL,

Engineer-in-Chief.

O. 3247.

March 15, 1905.

J. A. BenseL, Esq.,  
Engineer-in-Chief.

1326

Sir:—

In obedience to the within order I have ordered dredging along the southerly side of the inshore end of the pier foot of 41st Street, North River.

Work was begun March 6th, 1905, and finished March 7th, 1905, by the Henry DuBois Sons Co. under Contract No. 880.

5,991 cubic yards of material were excavated and removed, and an average depth of about 15 feet was made over the area dredged.

Very respectfully,

Your obedient servant,

CHAS. E. TROUT,  
Assistant Engineer.



*Plaintiff's Exhibit 32*

1327

Print attached shows soundings after dredging.  
File H. C. G.

Endorsed on the Back

E. O.

41st Street, N. R.

Proceed with dredging at—and reports work done  
by the Henry DuBois Sons Co. under Contract No.  
880.

March 1, 1905.

March 15, 1905.

C. E. T.

1328

1329

1330

**Plaintiffs' Exhibit No. 33.**

DEPARTMENT OF DOCKS AND FERRIES.

24th June, 1912.

O. 13055

B. O. 10956

Mr. H. C. Calkins,

Asst. Engineer.

Sir:—

1331

You will please superintend the work of erecting a fence on the pile platform approach to the Pier foot of 41st Street, North River, permit having on the 22d inst been granted the Central Railroad Co. of N. J. upon the following conditions:—

(1) The fence is to be erected under your direction and supervision.

(2) The fence is to remain thereat at the will of the Commissioner of Docks and is to be removed at the permittees cost and expense immediately upon receipt of notice from this Department at any time calling for such removal.

1332

(3) The gate shall be kept open at all times during business hours.

(4) The fence is to be constructed of such type and in such manner that when the gates are open traffic will not be obstructed or impeded.

Very respectfully,

CHAS. W. STANIFORD,

Chief Engineer.

O. 13055

B. O. 10956

*Plaintiff's Exhibit 33*

1333

West 57th St. Office,

Sept. 11, 1912.

SUBJECT—ERECTING FENCE ON PILE  
PLATFORM APPROACH TO WEST 41ST  
ST. PIER, NORTH RIVER—C. R. R.  
OF N. J.

C. W. Staniford, Esq.,  
Chief Engineer.

Sir:—

1334

In obedience to the above order, I beg to advise you that I superintended the work of erecting a fence on the pile platform approach to the Pier foot of 41st Street, North River, permit having been granted the Central Railroad Co. of N. J.

Work was begun August 22, 1912; finished September 10, 1912.

Under Special Order No. 78, dated March 1, 1912, I beg to advise that the cost of said work was \$150.00.

Very respectfully,

1335

H. C. CALKINS,  
Assistant Engineer.

File H. C. C.

Endorsed on back  
B. O. 10956  
41 St., N. R.

Superintend erecting fence foot of—by Central  
R.R. of N. J.

June 24, 1912.

Sept. 11, 1912.

H. C. C.

1336

**Plaintiffs' Exhibit No. 34.**

DEPARTMENT OF DOCKS AND FERRIES.

9th March 1912

O. 12389

B.O. 10550

Mr. Charles E. Trout

Asst Engineer

Sir:—

You will please superintend dredging in the slip at the foot of 39th Street, North River, permit having on the 8th inst been granted Michael Egan.

1337

Very respectfully,

CHAS. W. STANIFORD,

Chief Engineer.

SURVEYOR'S OFFICE.

B. O. 10550

C. W. Staniford, Esq.,

Chief Engineer.

Sir:

1338

In obedience to the within order I have superintended the work of Dredging the slip at the foot of 39th Street, North River, permit having been granted to Michael Egan on March 8th, 1912.

Work was begun March 10th, 1912, and finished March 11th, 1912, by Taylor Dredging Co., at a cost of about \$300.00 (dollars) and an average depth of 16 feet was made over the area Dredged.

Very respectfully,

CHAS. E. TROUT,

Asst. Engineer.

Endorsed on back:

B. O. 10550.

39th Street,

North River.

Superintend dredging slip by MICHAEL EGAN.

March 9, 1912.

March 13, 1912.

C.E.T.

**Plaintiffs' Exhibit No. 35.**

1339

**DEPARTMENT OF DOCKS,**

New York, 4th May 1897

O. 17888

S. O. 17195

Mr. C. W. Staniford  
Surveyor

Sir:—

You will please order dredging at north and south side of Pier foot of 40th Street, North River in accordance with my recommendation on your report on request of Union Stock Yard and Market Co of the 28th ulto. 1340

Very Respectfully

Your Obedient Servant.

G. S. Greene  
Engineer-in-Chief.**SURVEYOR'S OFFICE PIER "A" NORTH  
RIVER.**

New York 13 July, 1897.

1341

O. 17888

S. O. 17195.

G. S. GREENE, JR., ESQ.,  
Engineer-in-Chief.

Sir:—

In obedience to the within order, I have ordered dredging in the half-slips adjoining the Pier at 40th Street, North River.

The work was commenced 22nd May, 1897, and finished 8th July, 1897, by Steers & Bensel, contractors under Contract 536, and by Charles DuBois, under Contract 589. 48,951 cubic yards of material were excavated and removed, namely under Contract 536:—20,446 cubic yards, and under Contract 589:—28,505 cubic yards.

1342

*Plaintiff's Exhibit 35*

A depth of 15 feet at mean low water, was made at the approach, and 20 feet at mean low water, in the half-slips adjoining the pier

Very respectfully,

Your obedient servant,

Chas. W. Staniford

Surveyor

Tracing attached.

1343

Endorsed on the back

S. O. 17,195

PIER AT 40TH STREET N. R.

Order dredging at on request of Union Stock Yard And Market Co. and reports work done at by Steers and Benschel under Cont. No. 536 and Charles DuBois under Contract No. 589.

May 4 '97

July 13th '97

C. W. S.

1344

**Plaintiffs' Exhibit No. 36.**

1345

**DEPARTMENT OF DOCKS and FERRIES.**

C. 20238 New York, July 11th 1899.

S. O. 19321

Mr. W. E. Belknap,

Asst. Engineer.

Sir:—

You will please order dredging at the southerly side of Pier foot of West 40th Street, in accordance with my report on the application of the Union Stock Yard and Market Co. of the 30th ult.

Very respectfully

1346

Your Obedient Servant

J. A. BenseL

Engineer-in-Chief.

O. 20238

S. O. 19321

New York, July 29th 1899

J. A. BenseL Esq.

Engineer-in-Chief.

Sir:—

In accordance with within order I have ordered dredging on south side of Pier foot of West 40th Street. Work was begun 15th, and finished July 26th 1899 by Edward S. Walsh under contract No. 638. 20,245 cubic yards of material was excavated and removed and an average depth of 16½ feet at mean low water made over the area dredged.

1347

Very respectfully

Your Obedient Servant

W. E. Belknap

OK

Asst. Engineer.

JB

Endorsed on the back.

S. O. 19,321

Pier W. 40th Street, North River

Order dredging on application of Union Stock Yard and Market Co. and reports work done by E. S. Walsh under Contract No. 638.

July 11th '99

July 29th '99

W. E. B.

1348

**Plaintiffs' Exhibit No. 37.**

DEPARTMENT OF DOCKS AND FERRIES.

New York, May 20, 1901.

O. 21939

S. O. 21009

Mr. W. E. Belknap,  
Asst. Engineer

Sir:—

1349

You will please order dredging at the north and south sides of the pier foot of 40th Street, North river, in accordance with the request of the Union Stock Yard & Market Co.

Very respectfully

Your Obedient Servant

J. A. Bensel

June 20th, 1901.

1350

O. 21939.

B. O. 21009.

J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:—

In accordance with the within order, I have ordered dredging at the north and south sides of pier foot of 40th Street, N. R. Work was begun May 22nd and finished June 1st, 1901. by Henry DuBoise Sons Co. under contract 694.

29786 cubic yards of material were excavated and



*Plaintiff's Exhibit 37*

1351

removed and an average depth of about 16 feet made over the area dredged.

Very respectfully,

Your obedient servant.

W. E. Belknap

Assistant Engineer.

P. S.

1352

Tracing attached showing sounding, after dredging. Endorsed on the back.

S. O. 21009

Pier 40th St. N. R.

Orders dredging and reports completion by Henry Dubois Sons Co. under Contract #694. on request of Union Stock Yard & Market Co

May 20, 1900

June 20, 1901.

1353

W. E. B.

1354

**Plaintiffs' Exhibit No. 38.**

DEPARTMENT OF DOCKS AND FERRIES.

New York, Dec. 4, 1907.

O. 7302.

B. O. 5791

Mr. Chas. E. Trout,

Asst. Engineer.

Sir:—

1355

You will please order dredging to a depth of 15 feet at mean low water in the half slips adjoining the pier at the foot of 40th Street, N. R., the work to be done under Contract 1040, in accordance with my recommendation of the 22nd ult.

Very respectfully,

Chas. W. Staniford.

Engineer-in-Chief.

1356

December 31st, 1907,

O. 7302.

B. O. 5791.

Chas. W. Staniford, Esq.,

Engineer-in-Chief.

Sir:—

In obedience to the within order, I have ordered dredging in the half slips adjoining the pier foot of 40th street, N. R.

Work was begun Dec. 11, 1907, and was finished Dec. 13, 1907, by the Henry DuBois Sons Co., under Contract No. 1040.

*Plaintiff's Exhibit 38*

1357

6,169 cubic yards of material were excavated and removed and an average depth of about 16 feet at mean low water was made over the area dredged.

The attached print shows soundings taken after dredging.

Very respectfully,

Your obedient servant,

Chas. E. Trout,

Asst. Engineer. 1358

File H. C. G.

Endorsed on the back

B. O. 5791

Pier West 40th Street, N. R.

Order dredging reports work done under contract #1040 by the Henry DuBois Sons Co.

Dec. 4, 1907

Dec. 31, 1907

1359

C. E. T.

1360

**Plaintiffs' Exhibit No. 39.**

DEPARTMENT OF DOCKS AND FERRIES.

New York, 6th June 1904

O. 2504

B. O. 2414

Mr Herman Conrow

Asst Engineer

Sir:—

1361

You will please order dredging to a depth of 15 feet at mean low water in the half slip adjoining the southerly side of Pier and approach at the foot of 40th Street, North River, the work to be done under contract No 786 in accordance with my recommendation on the communications from the Union Stock Yard and Market Co and Joseph Stern & Sons.

Very Respectfully

Your Obedient Servant

1362

J A Bensel

Engineer-in-Chief.

July 1, 1904.

O. 2504,

B. O. 2414.

J. A. Bensel, Esq.,

Engineer-in-Chief.

Sir:—

In obedience to the within order I have ordered dredging in the half slip adjoining the southerly side of Pier and approach at the foot of 40th Street, North River.

*Plaintiff's Exhibit 39*

1363

The work was begun June 10th, 1904, and finished June 15th, 1904, by the Henry Du Bois Sons Co. under Contract #786.

10,029 cubic yards of material were excavated and removed, and an average depth of 16½ feet at mean low water was made over the area dredged.

As a depth of only 15 feet at mean low water was ordered, and as according to the terms of the contract no material removed from below one foot below the depth ordered is to be paid for, I have deducted 850 cubic yards, being the amount of material removed from below 16 feet at mean low water.

1364

The amount to be charged under this order is therefore 9,179 cubic yards.

Very respectfully,

Your obedient servant,

H. Conrow.

Assistant Engineer.

Print attached showing soundings after dredging.

1365

Endorsed on the back.

B. O. 2414

Pier West 40th Street, N. R.

Order dredging on communications from Union Stock Yard & Market Co. & Joseph Stern & Sons reports work done by Henry DuBoix Sons Co. under con. 786.

June 6, 1904

July 1, 1904

H. C.

1366

**Plaintiffs' Exhibit No. 40.**

DEPARTMENT OF DOCKS AND FERRIES.

New York, 12th April 1905

O. 3368

B. O. 3167

Mr. Chas. E. Trout,  
Ass't Engineer.

Sir:

1367

You will please order dredging to a depth of 15 feet at mean low water at the inshore end, and to a depth of 18 feet at mean low water at the out-shore end of Pier foot of 40th Street, N. R., under contract 880, in accordance with my recommendation of the 6th inst on request of the Union Stock Yard & Market Co.

Very respectfully,

J. A. Bensel,  
Engineer-in-Chief.

1368

May 3, 1905.

O. 3368.

B. O. 3167.

J. A. Bensel, Esq.,  
Engineer-in-Chief.

Sir:

In obedience to the within order I have ordered dredging on the northerly side of the pier at the foot of West 40th Street, North River.

Work was begun April 14, 1905, and finished April 18, 1905, by the Henry Du Bois Sons Co. under Contract No. 880.

*Plaintiff's Exhibit 40*

1369

10,995 cubic yards of material were excavated and removed, and an average depth of about 15 feet at mean low water was made at the inshore end and about 18 feet at mean low water was made at the outshore end.

Very respectfully,

Your obedient servant,

Chas. E. Trout,  
Assistant Engineer. 1370

Print attached showing soundings after dredging.

FILE

H. C. T.

Endorsed on back

B. O. 3167

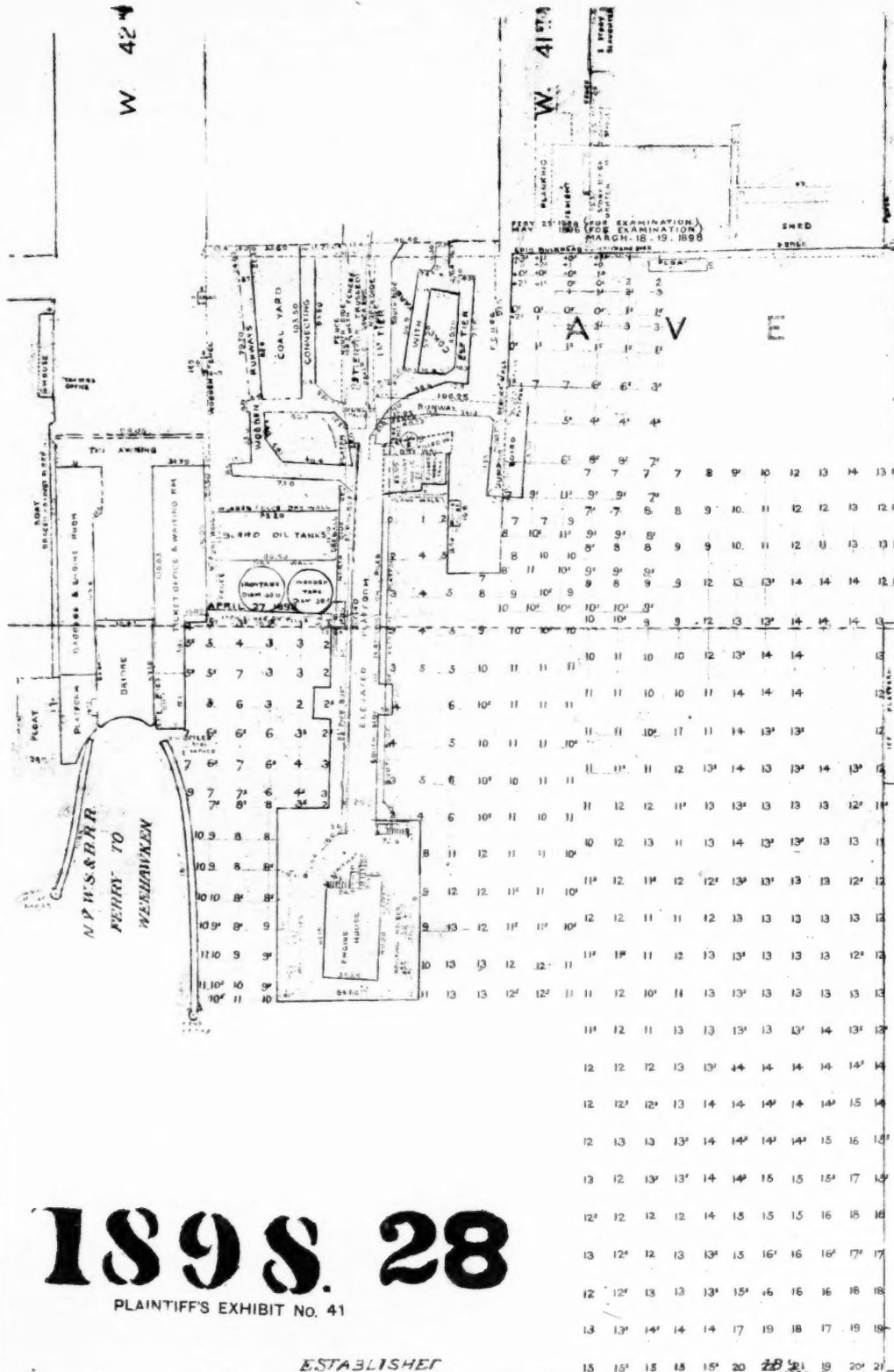
PIER 40TH STREET, N. R.

Order dredging reports work done under contract 880 by the Henry Du Bois Sons Co. at request of the Union Stock Yard & Market Co. 1371

Apl. 12, 1905

May 3, 1905

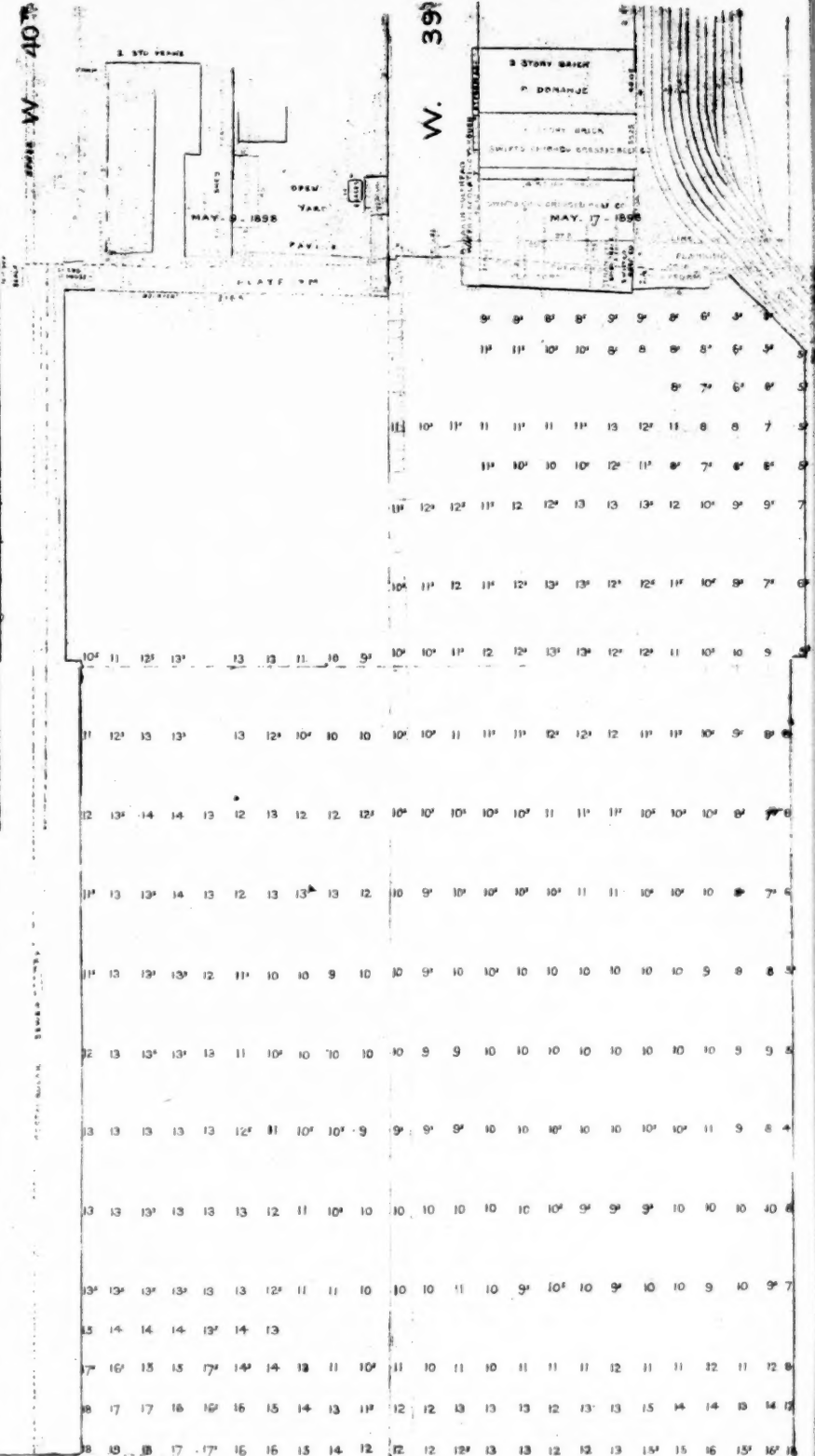
C. E. T.



1898. 28

PLAINTIFF'S EXHIBIT NO. 41

ESTABLISHED





PLAINTIFF'S EXHIBIT NO. 40

PLAINTIFF'S EXHIBIT NO. 45

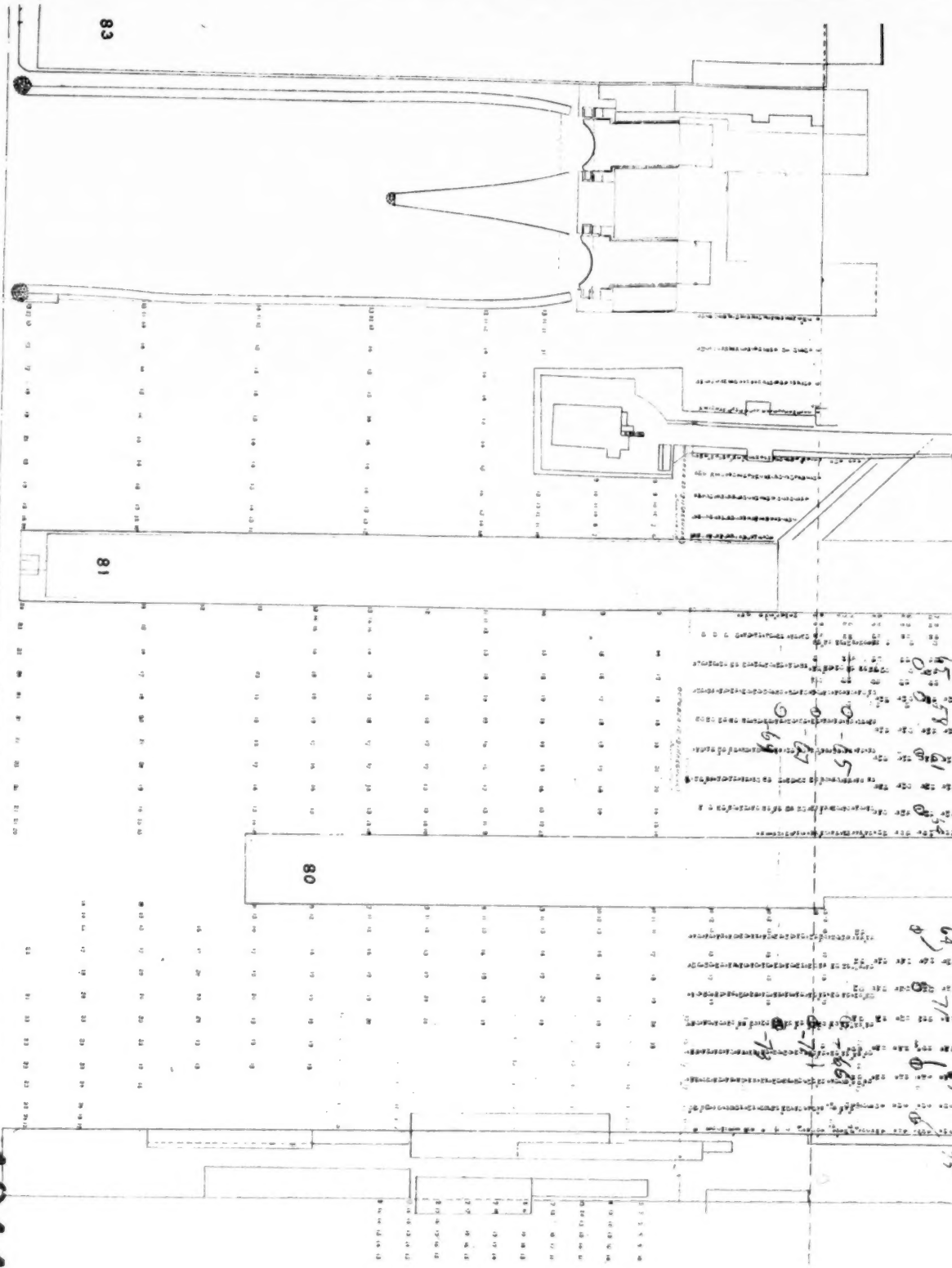
TWELFTH AVE.

W. 42ND ST.

W. 41ST ST.

W. 40TH ST.

W. 39TH ST.



30

1911



**Plaintiffs' Exhibit No. 42.**

1381

(Sounding Map, 1905.)

**Plaintiffs' Exhibit No. 43.**

1382

(Sounding Map, 1906.)

**Plaintiffs' Exhibit No. 44.**

1383

(Sounding Map, 1907.)

**Plaintiffs' Exhibit No. 46.**

1393

(Sounding Map, 1914.)

**Plaintiffs' Exhibit No. 47.**

LEASE from the City of New York, by the Commissioner of Docks, to the New York Butchers Dressed Meat Company, dated December 11, 1914, duly signed and acknowledged. Leases for a term commencing January 1, 1915 and expiring April 1, 1924, All and singular the wharfage which may arise, accrue and become due for the use and occupation in the manner and at the rates prescribed by law of ALL that certain wharf property, situated on the North River in the Borough of Manhattan, City of New York, County of New York, and known and described as follows, to wit:

.394

PARCEL "A": One hundred and fifty (150) feet on the north side at the inner end of the pier foot of West 39th Street.

PARCEL "B": That portion of the northerly side of the pier foot of West 39th Street, commencing at the inshore end of the premises leased by the City to the New York Horse Manure Transportation Company (being about six hundred and thirty-one feet easterly from the outer end of the pier) and extending easterly a distance of one hundred and fifty (150) feet to the westerly end of the premises described in Parcel "A".

1395

The rent is as follows:—

For Parcel A, four equal quarter yearly payments of \$1732.50, for Parcel B, four equal quarter yearly payments of \$1980.

The said party of the second part covenants and agrees that it will at all times (remove all obstruc-

1396

*Plaintiff's Exhibit 47*

tions) and do such dredging from time to time during the term hereby created as may be considered by the Commissioner of Docks necessary and proper to be done, in the half basin or slips or water immediately adjacent to the said premises.

1397

AND the said parties of the second part further covenant and agree that if at any time during the term hereby created, the said party of the first part shall determine to proceed with the work of building or rebuilding wharves, piers, bulkheads, basins, docks or slips, as it may become necessary for the party hereto of the first part to resume possession of the premises herein demised for the purpose of providing and constructing terminal facilities, pursuant to Chapter 776 of the Laws of 1911, or any amendment thereof or for the purposes of other water front improvement within a section or district of the water-front which shall include the premises hereinbefore described, according to any plan or plans now adopted and approved, or which may hereafter be adopted and approved, and pursuant to any existing or future law, and if the said party of the first part shall determine that for the purpose of such building or rebuilding, provision or construction, it will be necessary to terminate the interest of the parties of the second part in this lease or in the wharfage to arise, accrue or become due from the said wharf property, or any part thereof, then upon thirty days written notice to the said parties of the second part from the said party of the first part to that effect, describing the premises or the part thereof affected thereby, the interest of the said party of the second part in this lease and in the said wharfage and in the said wharf property or part thereof under this lease, shall be thereby terminated and this lease cancelled and annulled and

1398

*Plaintiff's Exhibit 47*

1399

the rent hereby reserved shall cease from the date of the receipt of such notice, and the parties of the second part will upon the expiration of the said period of thirty days, deliver up and surrender the possession of premises herein demised to the said party of the first part and no claim for damages or compensation in favor of the said parties of the second part, by reason of the termination of this lease or of such interest in said wharfage or wharf property, or for damages or injury to any steam or sailing vessel or water craft moored thereto, or on, in or about the same or to or on account of any structures of improvements that may have been erected or made by said parties of the second part, shall at any time be made by the said parties of the second part or by any person or persons whomsoever.

1400

AND in the event that the interest of the parties of the second part in the wharfage of only a part of said demised premises shall be terminated, as hereinbefore provided, such proportionate deduction from the rent herein and hereby reserved shall be made by the party of the first part, as it shall deem to be just and reasonable.

1401

1402

**Plaintiffs' Exhibit No. 48.**

LEASE, from the City of New York, acting by the Commissioner of Docks, to the New York Horse Manure Transportation Company, dated March 30, 1912, duly signed and acknowledged and recorded April 25, 1912 in the Register's office of New York County. Leased for a term of 5 years from July 1, 1912

1403

ALL that certain wharf property situated on the North River, in the Borough of Manhattan, City of New York, County of New York, and known and described as follows, to wit:

That portion of the northerly side of the pier at the foot of West Thirty-ninth Street, commencing at the inshore end of the space occupied by the offal contractor, (being about three hundred and fifty four feet easterly from the outer end of said pier) and extending easterly a distance of two hundred and seventy-seven (277) feet.

1404

TOGETHER with the right to enter upon the said wharf property for the purposes of this lease, and the party of the first part, hereby grants, license and permission to the party of the second part to maintain a dumping board with the necessary runway scale-house tool-house and shelters for workmen upon, over and adjoining the wharf property herein demised.

AND the party of the second part covenants that said dumping board shall be exclusive used for dumping manure,

The rental is four equal quarter yearly payments of \$3300 each.

The said party of the second part covenants and agrees that it will at all times do such dredging from time to time either before or during the term hereby created as may be considered by the Commissioner of Docks, necessary and proper to be done in the half basins or slips or waters immediately adjacent to the said premises.

*Plaintiff's Exhibit 48*

1405

AND the said party of the second part further covenants and agrees that if at any time during the term hereby created the said party of the first part shall determine to proceed with the work of building or rebuilding wharves, piers, bulkheads, basins, docks or slips, within a section or district of the water front which shall include the premises hereinbefore described according to any plan or plans now adopted and approved or which may hereafter be adopted and approved and pursuant to any existing or future law and if the said party of the first part shall determine that for the purpose of such building or rebuilding, it will be necessary to terminate the interest of the party of the second part in the said wharf property or any part thereof then upon service as hereinbefore provided upon the said party of the second part of written notice from the said party of the first part to that effect describing the premises or the part thereof, affected thereby, the interest of the said party of the second part in the said wharf property or part thereof under this lease shall be thereby terminated and the rent hereby reserved shall cease from the date of the receipt of such notice and no claim for damages or compensation in favor of the said party of the second part by reason of the termination of such interest in said wharf property or for damages to or on account of any structure or improvements that may have been erected or made by said party of the second part shall at any time be made by the said party of the second part or by any person or persons whomsoever and in the event that the interest of the party of the second part in only a part of said demised premises shall be terminated as hereinbefore provided such proportionate deduction from the rent herein and hereby reserved shall be made by the party of the first part as it shall deem to be just and reasonable.

1406

1407



1408

**Plaintiffs' Exhibit No. 49.**

THIS AGREEMENT, made the first day of May in the year One thousand nine hundred and fifteen by and between THE CITY OF NEW YORK, by the Commissioner of Docks, party of the first part, and Burns Bros., 20 Church street, Manhattan, party of the second part, WITNESSETH: THAT the said party of the first part, for and in consideration of the rents, covenants, agreements, terms and conditions hereinafter mentioned and contained, on the part of the said party of the second part to be paid, performed, kept, done and observed, hereby licenses and permits the party of the second part, to use and occupy, during the pleasure of the Commissioner of Docks, but not longer than April 30, 1916.

1409

ALL that certain public wharf property, situated on the North River, in the Borough of Manhattan City of New York, County of New York and known and described as follows, to wit:

1410

Berth 100 feet in length on the south side of the approach to the pier foot of West 40th street, immediately outshore of the bulkhead.

TOGETHER with the right to enter upon the said wharf property, for the purposes of this license or permit.

(a) AND the said party of the first part hereby authorizes and empowers the said party of the second part, so far as such authority can be conferred by the said party of the first part to ask, demand, sue for, levy, recover and receive in the name to the use and at the expense of the said party of the second part, such wharfage as may during the continuance of said license or permit arise, accrue, or become due from the master, owner, factor or

*Plaintiff's Exhibit 49*

1411

agent of any vessel which shall, during the said license or permit, come to lie at or use the herein-before mentioned wharf property.

(b) AND the said party of the second part, in consideration of the license and permit aforesaid, and of the covenants and agreements on the part of the said party of the first part, its successors and assigns, herein contained has covenanted, promised and agreed, and does hereby covenant, promise and agree to and with the said party of the first part, that it, the said party of the second part, shall and will, well and truly, and without any manner of deduction, abatement, fraud or delay pay or cause to be paid to the said party of the first part, its successors or assigns, the rent or sum of \$1350. per annum, payable quarterly in advance to the Cashier of the Department of Docks and Ferries.

1412

(f) AND the said party of the second part covenants and agrees that it will at all times during the continuance of this license or permit do all dredging, made necessary by reason of the negligence of the party of the second part, its agents or employees, in the basins or slips or water adjacent to the said premises.

1413

1414

**Plaintiffs' Exhibit No. 50.**

THIS AGREEMENT, made the first day of May in the year One thousand nine hundred and fifteen by and between THE CITY OF NEW YORK, by the Commissioner of Docks, party of the first part, and New York Stock Yards Company, Marsh & Wever, Attorneys, 42 Broadway. Weehawken Stock Yards Co., 50 Church Street. party of the second part, WITNESSETH: THAT the said party of the first part, for and in consideration of the rents, covenants, agreements, terms and conditions herein-  
 1415 after mentioned and contained, on the part of the said party of the second part to be paid, performed, kept, done and observed, hereby licenses and permits the party of the second part, to use and occupy, during the pleasure of the Commissioner of Docks, but not longer than April 30, 19.....

ALL that certain public wharf property, situated on the North River, in the Borough of Manhattan City of New York, County of New York and known and described as follows, to wit: Space 10 feet by 250 feet on the northerly side of the approach to  
 1416 pier foot of West 40th Street, together with privilege of maintaining a fence dividing the runaway from the present approach.

TOGETHER with the right to enter upon the said wharf property, for the purposes of this license or permit.

(a) AND the said party of the first part hereby authorizes and empowers the said party of the second part, so far as such authority can be conferred by the said party of the first part to ask, demand, sue for, levy, recover and receive in the name to the use and at the expense of the said party of the second part, such wharfage as may during the continuance of said license or permit arise, accrue, or

*Plaintiff's Exhibit 50*

1417

become due from the master, owner, factor or agent of any vessel which shall, during the said license or permit, come to, lie at, or use the hereinbefore mentioned wharf property.

(b) AND the said party of the second part, in consideration of the license and permit aforesaid, and of the covenants and agreements on the part of the said party of the first part, its successors and assigns, herein contained has covenanted, promised and agreed, and does hereby covenant, promise and agree to and with the said party of the first part, that it, the said party of the second part, shall and will, well and truly, and without any manner of deduction, abatement, fraud or delay pay or cause to be paid to the said party of the first part, its successors or assigns. The rent or sum of four thousand, two hundred dollars per annum, payable in equal quarterly yearly payments in advance to the Cashier of the Department of Docks and Ferries.

1418

(f) AND the said party of the second part covenants and agrees that it will at all times during the continuance of this license or permit do all dredging, made necessary by reason of the negligence of the party of the second part, its agents or employees, in the basins or slips or water adjacent to the said premises.

1419

1420

**Plaintiffs' Exhibit No. 51.**

LEASE, from the City of New York, by the Commissioner of Docks, to Central Railroad Company of New Jersey, dated August 17, 1909 for a term of ten years of All and Singular the wharfage which may arise accrue or become due for the use and occupation in the manner and at the rates prescribed by law of All That certain wharf property situated on the North River in the Borough of Manhattan, City of New York, County of New York, and known and described as follows, to wit.

1421

The outer seven hundred (700) feet of the pier foot of West 40th Street when said pier shall be extended out to the pierhead line established by the Secretary of War in 1897.

AND, the said party of the first part gives and grants unto the said party of the second part license and authority to erect a shed upon said pier in accordance with plans and specifications to be submitted to and approved by the Chief Engineer of the Department of Docks and Ferries, the said shed to revert to and between the property of The City of New York at the expiration or sooner termination of this lease, Together with the rights to enter upon the said wharf property for the purposes of this lease and to collect the said wharfage.

1422

The lease contains the usual clause as to the dredging of the half basins or slips immediately adjacent to the said premises.

The lease contains a renewal clause for 10 years at \$20,790 yearly, and also provides that the said renewal clause shall provide for another term thereafter of 10 years at an annual rental of \$22,869.

**Plaintiffs' Exhibit No. 52.**

1423

LEASE, from the City of New York, acting by and through the Commissioner of Docks, to the Central Railroad Company of New Jersey, dated April 14, 1914, leased for a term of 10 years expiring November 28, 1924.

ALL that certain wharf property, situated on the North River, in the Borough of Manhattan, City of New York, County of New York and known and described as follows, to wit:

The south side of the pier at the foot of West 41st Street beginning at a line in said pier about 795 feet from the outer end (being the easterly line of the property leased to the Central Railroad Company of New Jersey by an Indenture dated June 18, 1909) and extending in shore a distance of 158 feet more or less to the easterly end of said pier.

1424

TOGETHER with the right to enter upon the said wharf property for the purposes of this lease.

The rental is \$2195.38 per year. The lease contains the usual clause as to dredging the half basins or slips or water immediately adjacent to the said premises.

1425

Same clause as to termination of lease in the event that the Commissioner of Docks shall determine to proceed with the work of building or rebuilding wharves, piers, bulkheads, basins, docks or slips within this section.

1426

**Plaintiffs' Exhibit No. 53.**

LEASE from the City of New York, acting by and through the Commissioner of Docks, to the Central Railroad Company of New Jersey, dated August 19, 1914, reciting a previous lease with a privilege of renewal and leased for a period of 10 years from November 28, 1914.

ALL AND SINGULAR the wharfage which may arise, accrue or become due for the use and occupation in the manner and at the rates prescribed by law, of

1427

ALL that certain wharf property, situated on the North River, in the Borough of Manhattan, City of New York, County of New York, and known and described as follows, to wit:

1428

The South side of the pier at the foot of West 41st Street, commencing at a line in said pier about 700 feet from the outer end (being the easterly line of the property leased to E. E. Olcott), and extending inshore a distance of 95 feet, more or less, to the westerly end of the existing dumping board now used by the Consolidated Gas Company, including the use of the entire surface of the pier, (opposite the 95 feet), subject, however, to all the rights of the Consolidated Gas Company by virtue of an agreement made December 9, 1903, between the said company and The City of New York, by the Commissioner of Docks.

TOGETHER with the rights to enter upon the said wharf property, for the purposes of this lease, and to collect the said wharfage.

The rental is \$1320 to be paid yearly in each year in equal quarter yearly payments in advance. The lease contains the usual clause as to dredging the half basins or slips or water immediately adjacent to the said premises.

Same clause as to termination of lease in the event that the Commissioner of Docks shall determine to proceed with the work of building or rebuilding wharves, piers, bulkheads, basins, docks or slips within this section.

**Plaintiffs' Exhibit No. 54.**

1429

AGREEMENT between Consolidated Gas Company of New York, and The City of New York, acting by the Commissioner of Docks, dated December 9, 1903, recites the injunction obtained by the party of the first part against the party of the second part, restraining it from building a pier at the foot of West 41st Street on the North River, and the agreement to vacate the injunction by consent based upon several respective covenants and agreements of the respective parties, including the following.

1430

FOURTH. The party of the second part covenants to lease to the party of the first part, in consideration of the mutual covenants herein contained, the right to maintain a dumping board at such point on the southerly side of West Forty-first Street between the line of the existing bulkhead and the bulkhead line (as now established by the War Department), or on the southerly side of the proposed new pier at the foot of said West Forty-first Street, as may from time to time be selected by the Commissioner of Docks; the said party of the first part to be leased, however, the exclusive use of such dumping board, for the purposes of its own business only, and the free, uninterrupted and exclusive right of approach thereto from its property between West Forty-first and Forty-second Street, and free access thereto by water from the North River at all reasonable times necessary for the conduct of its business; any initial dredging necessary to give such access from the North River, to a depth of ten feet at mean low water, to be done at the expense of the party of the second part.

1431



1432

**Plaintiffs' Exhibit No. 55.**

LEASE, from the City of New York, by the Commissioner of Docks, to Eben E. Olcott, dated December 30, 1903, for a period of 10 years with the privilege of one renewal from the date when the pier is completed.

ALL that certain wharf property, situated on North River, in the Borough of Manhattan, The City of New York, County of New York and known and described as follows, to wit:

1433

The south side, the outer end and the entire surface of the pier at the foot of West 41st Street, 700 feet in length and 60 feet in width, extending from the established bulkhead line out to the pierhead line established by the Secretary of War in 1897, a space not exceeding 75 feet to be reserved at the northerly side and westerly end of said pier for running spring lines to vessels landing at the end of the pier

TOGETHER with the right to enter upon the said wharf property, for the purpose of this lease,

1434

The rental is \$8800. The lease contains the usual clause as to dredging the half basins or slips or water immediately adjacent to the said premises.

**Plaintiffs' Exhibits Nos. 56-71—Rent Rolls, 1892-1906.  
Plaintiffs' Exhibit No. 72.**

1907 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY
150 feet north side inner end pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904
150 feet north side of pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum	the Sinking Fund March 16, 1904
150 feet on north side of pier foot of West 39th Street, adjoining space occupied by the official dock, to be used in loading manure on scows	Shea and Devine	At pleasure of the Commissioner	\$1,800.00 per annum	Action of the Commissioner Oct. 25, 1907
277 feet north side of pier 79 at West 39th Street, for manure dump	New York Horse Manure Transportation Company	July 1, 1907 to July 1, 1912	\$1,600.00 per annum	Action of the Commissioner, March 28 and 1
Land under water for platform southerly about 66 feet from West 40th Street	Curtis Blaisdell Company	At pleasure of the Commissioner	\$3,000.00 per annum	Action of the Commissioner May 31, 1907
125 feet south side inner end of pier foot of West 40th Street	Curtis Blaisdell Company	At pleasure of the Commissioner	\$254.10 per annum	Sinking Fund June 5, 1907
250 feet on the northerly side of approach pier at West 40th Street	Union Stock Yards & Market Company	At pleasure of the Commissioner	\$900.00 per annum	Action of Commissioner, May 15, 1906 and 1
200 feet south side of pier at West 40th Street for manure dump	Bernard Campbell and Company	At pleasure of the Commissioner	\$300.00 per month	Action of the Commissioner, Aug. 23, 1907
Berth 100 feet in length for manure scow, foot of West 40th Street	D. Devine	At pleasure of the Commissioner	\$200.00 per month	Action of the Commissioner, June 29, 1907
Pier at West 40th Street	Union Stock Yards & Market Company and Weehawken Stock Yards Company	At pleasure of the Commissioner	\$1,200.00 per annum	Action of the Commissioner, May 28 and Aug
South side outer end and surface of pier at West 41st Street, together with 75 feet on north side outer end	Eben E. Olcott, permission to sublet to Central Railroad of New Jersey	At pleasure of the Commissioner	\$8,800.00 per annum	Action of the Commissioner, Dec. 24, 1907
		May 1, 1902 to May 1, 1907	\$8,000.00 per annum	Action of the Commissioner April 21, 1902
		Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	the Sinking Fund April 25, 1902
		Nov. 28, 1914 to Nov. 28, 1924	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903,
				and Jan. 31, 1905; approved by the
				Nov. 15, 1905

**Plaintiffs' Exhibit No. 73.**

1908 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY
150 feet on the north side inner end of pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904
150 feet north side of pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum	the Sinking Fund March 16, 1904
150 feet on the north side of pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	At pleasure of the Commissioner	\$1,800.00 per annum	Action of the Commissioner, Oct. 25, 1907 and
277 feet north side of pier 79 at West 39th Street, for manure dump	New York Horse Manure Transportation Company	July 1, 1908 to April 1, 1914	\$1,800.00 per annum	Action of the Commissioner, June 19, 1908
Land under water for platform southerly about 66 feet from West 40th Street	Curtis Blaisdell Company	April 1, 1914 to April 1, 1924	\$1,980.00 per annum	the Sinking Fund June 30, 1908
125 feet south side inner end of pier foot of 40th Street	New York Butchers' Dressed Meat Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907
250 feet on the northerly side of the approach to pier at West 40th Street	Curtis Blaisdell Company	At pleasure of the Commissioner	\$254.10 per annum	the Sinking fund June 5, 1907
200 feet south side of pier at West 40th Street for manure dump	Union Stock Yard and Market Company	At pleasure of the Commissioner	\$900.00 per annum	Action of the Commissioner, May 1, 1907 and
Berth 100 feet in length for manure scow, foot of West 40th Street	Bernard Campbell and Company	At pleasure of the Commissioner	\$300.00 per month	Action of the Commissioner, August 23, 1907
South side outer end and surface of pier at West 41st Street, together with 75 feet on north side outer end	D. Devine	At pleasure of the Commissioner	\$200.00 per month	Action of the Commissioner, Jan. 29, 1907 and
	D. Devine	At pleasure of the Commissioner	\$1,200.00 per annum	Action of the Commissioner, May 28 and Aug
	Eben E. Olcott, permission to sublet portion of pier to Central Railroad of New Jersey	At pleasure of the Commissioner	\$75.00 per month	Action of the Commissioner, Dec. 24, 1907
		Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner, May 1, 1908
		Nov. 28, 1914 to Nov. 28, 1924	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903,
				and Jan. 31, 1905; approved by Sinking
				16, 1903

**Plaintiffs' Exhibits Nos. 56-71—Rent Rolls, 1892-1906.  
Plaintiffs' Exhibit No. 72.**

907 RIVER OF PROPERTY ad pier 79	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
79 at West 39th Street, be- feet from the inner end and	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum	Action of the Commissioner Oct. 25, 1907	\$548.63
der foot of West 39th Street, l by the official dock, to be on scows	Shea and Devine	At pleasure of the Commissioner	\$1,600.00 per annum	Action of the Commissioner, March 28 and May 1, 1907	\$678.58
79 at West 39th Street, for	New York Horse Manure Transpor- tation Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner May 31, 1907; approved by Sinking Fund June 5, 1907	\$1,500.00
form southerly about 66 feet	Curtis Blaisdell Company	At pleasure of the Commissioner	\$254.10 per annum	Action of Commissioner, May 15, 1906 and May 1, 1907	\$254.12
nd of pier foot of West 40th	Curtis Blaisdell Company	At pleasure of the Commissioner	\$900.00 per annum	Action of the Commissioner, Aug. 23, 1907	\$225.00
ide of approach pier at West	Union Stock Yards & Market Com- pany	At pleasure of the Commissioner	\$300.00 per month	Action of the Commissioner, June 29, 1907	\$2,400.00
er at West 40th Street for	Bernard Campbell and Company	At pleasure of the Commissioner	\$200.00 per month	Action of the Commissioner, May 28 and August 20, 1907	\$1,579.17
r manure scow, foot of West	D. Devine	At pleasure of the Commissioner	\$1,200.00 per annum	Action of the Commissioner, Dec. 24, 1907	
	Union Stock Yards & Market Com- pany and Weehawken Stock Yards Company	May 1, 1902 to May 1, 1907	\$8,800.00 per annum	Action of the Commissioner April 21, 1902; Approved by the Sinking Fund April 25, 1902	\$2,200.00
surface of pier at West 41st	Eben E. Olcott, permission to sub- let to Central Railroad of New Jersey	Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Nov. 15, 1905	\$8,000.00
feet on north side outer end		Nov. 28, 1914 to Nov. 28, 1924	\$8,800.00 per annum		

**Plaintiffs' Exhibit No. 73.**

908 RIVER OF PROPERTY inner end of pier 79	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
79 at West 39th Street, be- feet from the inner end and	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum	Action of the Commissioner, Oct. 25, 1907 and May 1, 1908	\$900.00
le of pier 79 at West 39th	New York Butchers' Dressed Meat Company	July 1, 1908 to April 1, 1914	\$1,800.00 per annum	Action of the Commissioner, June 19, 1908; approved by the Sinking Fund June 30, 1908	\$900.00
oint 150 feet from the inner y		April 1, 1914 to April 1, 1924	\$1,980.00 per annum		
79 at West 39th Street, for	New York Horse Manure Transpor- tation Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907; approved by the Sinking fund June 5, 1907	\$3,000.00
form southerly about 66 feet	Curtis Blaisdell Company	At pleasure of the Commissioner	\$254.10 per annum	Action of the Commissioner, May 1, 1907 and May 1, 1908	\$254.12
id of pier foot of 40th Street	Curtis Blaisdell Company	At pleasure of the Commissioner	\$900.00 per annum	Action of the Commissioner, August 23, 1907	\$150.00
side of the approach to pier	Union Stock Yard and Market Company	At pleasure of the Commissioner	\$300.00 per month	Action of the Commissioner, Jan. 29, 1907 and May 1, 1908	\$3,900.00
er at West 40th Street for	Bernard Campbell and Company	At pleasure of the Commissioner	\$200.00 per month	Action of the Commissioner, May 28 and Aug. 29, 1907	\$693.33
r manure scow, foot of West	D. Devine	At pleasure of the Commissioner	\$1,200.00 per annum	Action of the Commissioner, Dec. 24, 1907	\$528.90
r manure scow, foot of West	D. Devine	At pleasure of the Commissioner	\$75.00 per month	Action of the Commissioner, May 1, 1908	\$725.00
surface of pier at West 41st	Eben E. Olcott, permission to sub- let portion of pier to Central Railroad of New Jersey	Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by Sinking Fund Dec. 16, 1903	\$8,000.00
feet on north side outer end		Nov. 28, 1914 to Nov. 28, 1924	\$8,800.00 per annum		

## Plaintiffs' Exhibit No. 74.

1909 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
150 feet north side inner end of pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
150 feet on north side of pier 79 at West 39th Street, beginning at a point 150 feet from inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924 July 1, 1908 to April 1, 1924 April 1, 1914 to April 1, 1924	\$1,732.50 per annum \$1,800.00 per annum \$1,980.00 per annum	Action of the Commissioner June 19, 1908; approved by the Sinking Fund June 30, 1908	\$1,800.00
277 feet north side of pier 79 at West 39th Street, for manure dump	New York Horse Manure Transportation Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907; approved by Sinking Fund June 5, 1907	\$3,000.00
Land under water for platform, southerly about 66 feet from West 40th Street	Curtis Blaisdell Company	July 1, 1912 to July 1, 1917 At pleasure of the Commissioner	\$3,300.00 per annum \$254.10 per annum	Action of the Commissioner, May 1, 1908 and May 1, 1909	\$254.12
Outer 700 feet of the pier at the foot of West 40th Street	Central Railroad Company of New Jersey	10 years from occupation with two renewal terms of 10 years each	\$18,900.00 per annum. Renewal terms at advance of 10 per cent.	Action of the Commissioner, June 25th, 1909; approved by the Sinking Fund June 30, 1909	.....
250 feet on the northerly side of approach to pier at West 40th Street	Union Stock Yards and Market Company	At pleasure of the Commissioner	\$350.00 per month	Action of the Commissioner May 1, 1908 and May 1, 1909	\$4,050.00
Berth 100 feet in length for manure scow, foot of West 40th Street	P. F. & W. A. Kane	At pleasure of the Commissioner	\$900.00 per annum	Action of the Commissioner Sept. 9, 1909	\$450.00
Berth 100 feet in length for manure scow, foot of West 40th Street	D. Devine	At pleasure of the Commissioner	\$75.00 per month	Action of the Commissioner May 1, 1908 and May 1, 1909	\$450.00
South side outer end of pier at West 41st Street, together with 75 feet on north side outer end	Eben E. Olecott, permission to sublet portion to the Central Railroad Company of New Jersey	Nov. 28, 1904 to Nov. 28, 1914 Nov. 28, 1914 to Nov. 28, 1924	\$8,000.00 per annum \$8,800.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,000.00
South side inner end and surface of pier foot of West 41st Street	Central Railroad Company of New Jersey	July 1, 1909 to Nov. 28, 1914 Nov. 28, 1914 to Nov. 28, 1924	\$1,200.00 per annum \$1,320.00 per annum	Action by the Commissioner June 2, 1909; approved by the Sinking Fund June 11, 1909	\$600.00

## Plaintiffs' Exhibit No. 75.

1910 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
150 feet on north side inner end pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
150 feet on north side pier 79 at West 39th Street, beginning at a point 150 feet from inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924 July 1, 1908 to April 1, 1914 April 1, 1914 to April 1, 1924	\$1,732.50 per annum \$1,800.00 per annum \$1,980.00 per annum	Action of the Commissioner June 19, 1908; approved by the Sinking Fund June 30, 1908	\$1,800.00
277 feet north side of pier 79 at West 39th Street for manure dump	New York Horse Manure Transportation Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907; approved by Sinking Fund June 5, 1907	\$3,000.00
Land under water for platform southerly about 66 feet from West 40th Street	Curtis Blaisdell and Company	July 1, 1912 to July 1, 1917 At pleasure of the Commissioner	\$3,300.00 per annum \$254.10 per annum	Action of Commissioner May 1, 1909 and May 1, 1910	\$254.12
100 feet south side inner end and approach to pier at West 40th Street	Curtis Blaisdell and Company	At pleasure of the Commissioner	\$75.00 per month	Action of the Commissioner, May 17 and Oct. 11, 1910	\$440.33
Outer 700 feet of pier at foot of West 40th Street	Central Railroad of New Jersey, Dec 1, 1910, permit to sublet to Manhattan Navigation Company	10 years from occupation with two renewal terms of 10 years each	\$18,900.00 per annum. Renewal terms at an advance of 10 per cent.	Action of the Commissioner June 25, 1909; approved by the Sinking Fund June 30, 1909	.....
250 feet northerly side of approach to pier at West 40th Street	Union Stock Yard and Market Company	At pleasure of the Commissioner	\$350.00 per month	Action of the Commissioner, May 1, 1909 and May 1, 1910	\$4,200.00
Berth 150 feet in length for manure scow, foot of West 40th Street	P. F. & W. A. Kane	At pleasure of the Commissioner	\$900.00 per annum	Action of the Commissioner, Sept. 9, 1909 and May 1, 1910	\$9,000.00
South side outer end and surface of pier at West 41st Street, together with 75 feet north side outer end	Eben E. Olecott, permission to sublet portion of pier to Central Railroad of New Jersey	Nov. 28, 1904 to Nov. 28, 1914 Nov. 28, 1914 to Nov. 28, 1924	\$8,000.00 per annum \$8,800.00 per annum	Action of the Commissioner, Dec. 2, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,000.00

## Plaintiffs' Exhibit No. 76.

1911 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
150 feet north side inner end pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
150 feet north side pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum		
277 feet north side of pier 79 at West 39th Street, for manure dump		July 1, 1908 to April 1, 1914	\$1,800.00 per annum	Action of the Commissioner June 19, 1908; approved by the Sinking Fund June 30, 1908	\$1,800.00
Land under water for platform, southerly about 66 feet from West 40th Street	New York Horse Manure Transportation Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907; approved by the Sinking Fund June 5, 1907	\$3,000.00
100 feet south side inner end of approach to pier at West 40th Street	Curtiss Blaisdell Company	July 1, 1912 to July 1, 1917	\$3,300.00 per annum	Action of the Commissioner, May 1, 1910 and May 1, 1911	\$254.12
Outer 700 feet of pier at the foot of West 40th Street		At pleasure of the Commissioner	\$254.10 per annum	Action of the Commissioner, Oct. 11, 1910 and May 1, 1911	\$966.64
Use of surface of pier at West Fortieth Street during period of shed construction	Central Railroad Company of New Jersey, Dec. 21, 1910, permit to sublet to Manhattan Navigation Company	10 years from occupation with two renewal terms of 10 years each	\$18,900.00 per annum. Renewal terms at an advance of 10 per cent.	Action of the Commissioner, June 25, 1909; approved by the Sinking Fund June 30, 1909	.....
250 feet on northerly side of approach to pier at West 40th Street	Central Railroad Company of New Jersey	At pleasure of the Commissioner	\$787.50 per month	Action of the Commissioner, Sept. 29 and Oct. 16, 1911	\$1,968.75
Berth 100 feet in length, for manure scow, at foot of West 40th Street	New York Stock Yards Company and Weehawken Stock Yards Company	At pleasure of the Commissioner	\$350.00 per month	Action of the Commissioner, May 1, 1909 and May 1, 1910	\$4,200.00
South side outer end and surface of pier at West 41st Street, together with 75 feet on the north side outer end	P. F. and W. A. Kane	At pleasure of the Commissioner	\$1,000.00 per annum	Action of the Commissioner, May 1, 1910 and May 1, 1911	\$975.00
South side inner end and surface pier foot of West 41st Street, 95 feet	Eben E. Olcott, permission to sublet portion of pier to Central Railroad of New Jersey	Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,000.00
Additional 50 feet of the south side inner end of pier foot of West 41st Street	Central Railroad Company of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$1,200.00 per annum	Action of the Commissioner June 2, 1909; approved by the Sinking Fund June 11, 1909	\$1,200.00
159 feet south side inner end of pier at West 41st Street	Central Railroad Company of New Jersey	At pleasure of the Commissioner	\$631.58 per annum	Action of the Commissioner, Dec. 27, 1910	\$210.53
	Central Railroad Company of New Jersey	At pleasure of the Commissioner	\$1,995.80 per annum	Action of Commissioner Aug. 8, 1911	\$997.90

## Plaintiffs' Exhibit No. 77.

1912 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
150 feet on the north side inner end pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, March 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
150 feet north side of pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum		
277 feet north side of pier 79 at West 39th Street, for manure dump		July 1, 1908 to April 1, 1914	\$1,800.00 per annum	Action of the Commissioner, June 19, 1908; approved by the Sinking Fund June 30, 1908	\$1,800.00
Land under water from platform southerly about 66 feet from West 40th Street	New York Horse Manure Transportation Company	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner May 31, 1907 and May 12, 1912; approved by the Sinking Fund June 5, 1907	\$3,150.00
Outer 700 feet of pier at foot of West 40th Street	Curtis Blaisdell Company	July 1, 1912 to July 1, 1917	\$3,300.00 per annum	Action of the Commissioner, May 1, 1911 and May 1, 1912	\$337.85
100 feet south inner end of approach to pier at West 40th Street		At pleasure of the Commissioner	\$365.75 per annum	Action of the Commissioner June 25, 1909 and Jan. 30, 1912; approved by the Sinking Fund June 30, 1909	\$18,000.00
Use of surface of pier at West 40th Street during shed construction	Central Railroad Company of New Jersey, Dec. 21, 1912, permit to sublet to Manhattan Navigation Company	Feb. 1, 1912 to Feb. 1, 1922	\$18,900.00 per annum		
250 feet on the northerly side of approach to pier at West 40th Street.	Curtis Blaisdell Company	Feb. 1, 1922 to Feb. 1, 1932	\$20,790.00 per annum	Action of the Commissioner, Oct. 11, 1911 and May 1, 1912	\$996.96
Berth 100 feet in length for manure scow, foot of West 40th Street	Central Railroad Company of New Jersey	Feb. 1, 1932 to Feb. 1, 1942	\$22,869.00 per annum	Action of the Commissioner, Sept. 29 and Oct. 16, 1911	\$787.50
South side outer end surface of pier at West 41st Street, together with 75 feet on the north side outer end	New York Stock Yards Company and Weehawken Stocks Yards Company	At pleasure of the Commissioner	\$350.00 per month	Action of the Commissioner May 1, 1911 and May 1, 1912	.....
South side inner end surface of pier foot of West 41st Street, 95 feet	P. F. and W. A. Kane	At pleasure of the Commissioner	\$1,000.00 per annum	Action of the Commissioner, May 1, 1910 and May 1, 1911	\$83.34
159 feet south side inner end of pier at West 41st Street	Eben E. Olcott, permission to sublet part of the pier to Central Railroad Company of New Jersey	Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,000.00
	Central Railroad Company of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$8,800.00 per annum	Action of the Commissioner, June 2, 1909; approved by the Sinking Fund July 11, 1909	\$1,200.00
	Central Railroad Company of New Jersey	At pleasure of the Commissioner	\$1,995.80 per annum	Action of the Commissioners Aug. 8, 1911 and May 1, 1912	\$1,995.80



## Plaintiffs' Exhibit No. 78.

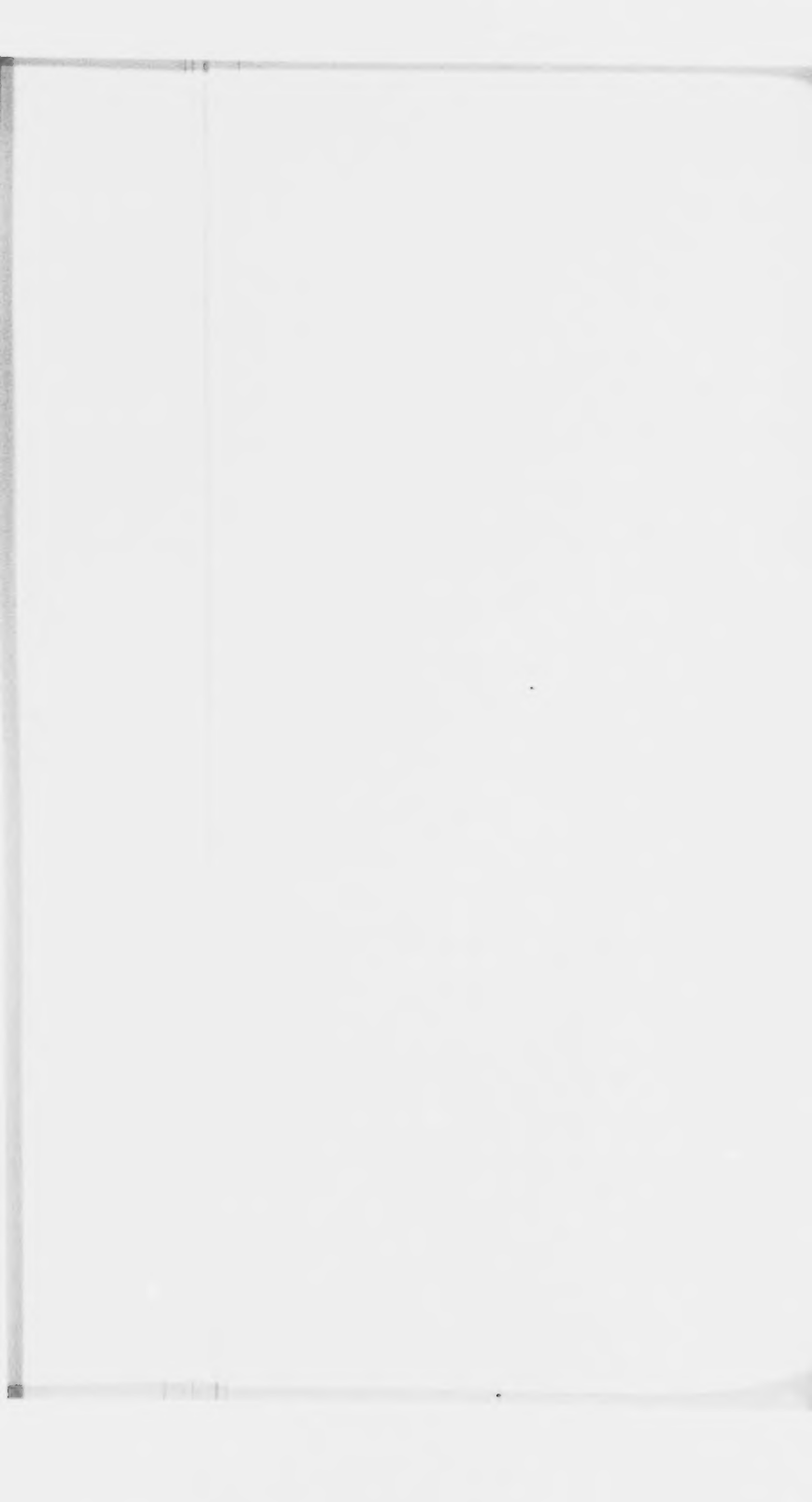
1913 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
150 feet on the north side inner end of pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, May 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,575.00
150 feet north side of pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum	Action of the Commissioner, June 19, 1908; approved by the Sinking Fund June 30, 1908	\$1,800.00
300 feet north side inner end of pier foot West 39th Street	New York Butchers' Dressed Meat Company	July 1, 1908 to April 1, 1914	\$1,800.00 per annum		
Privilege to maintain a pipe through the bulkhead and under pier 79	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,980.00 per annum		
277 feet north side of pier 79 at West 39th Street for manure dump	New York Butchers' Dressed Meat Company	Jan. 1, 1915 to April 1, 1924	\$3,712.50 per annum	Action by the Commissioner Nov. 25, 1914; approved by Sinking Fund Dec. 2, 1914	.....
Land under water from platform, southerly about 66 feet from West 40th Street.	New York Horse Manure Transportation Company	At pleasure of the Commissioner	\$300.00 per annum	Action of Commissioner, May 1, 1909	\$300.00
100 feet south inner end of approach to pier at West 40th Street	Curtis Blaisdell Company (now Burns Coal Company)	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907 and May 12, 1912; approved by the Sinking Fund June 5, 1907	\$3,150.00
Outer 700 feet of pier at the foot of West 40th Street	Curtis Blaisdell Company (now Burns Coal Company)	July 1, 1912 to July 1, 1917	\$3,300.00 per annum	Action of Commissioner May 1, 1912 and May 1, 1913	.....
	Curtis Blaisdell Company (now Burns Coal Company)	At pleasure of the Commissioner	\$365.75 per annum		
	Central Railroad Company of New Jersey, Dec. 21, 1912, permit to sublet to Manhattan Navigation Company.	At pleasure of the Commissioner	\$83.33 per month	Action of Commissioner, Oct. 11, 1912 and May 1, 1913	996.96
250 feet on the northerly side of approach to pier at West 40th Street	Central Railroad Company of New Jersey, Dec. 21, 1912, permit to sublet to Manhattan Navigation Company.	Feb. 1, 1912 to Feb. 1, 1922	\$18,900.00 per annum	Action of the Commissioner June 25, 1909 and Jan. 30, 1912; approved by the Sinking Fund June 30, 1909	\$18,900.00
South side outer end and surface of pier at West 41st Street, together with 75 feet on the north side outer end	Central Railroad Company of New Jersey	Feb. 1, 1922 to Feb. 1, 1932	\$20,790.00 per annum		
South side inner end and surface of pier foot of West 41st Street 95 feet.	Central Railroad Company of New Jersey	Feb. 1, 1932 to Feb. 1, 1942	\$22,869.00 per annum		
158 feet of south side inner end of pier at West 41st Street.	New York Stock Yards Company and Weehawken Stock Yards Company	At pleasure of the Commissioner	\$350.00 per month	Action of the Commissioner, May 1, 1911 and March 1, 1912	.....
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Nov. 8, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner Dec. 12, 1903, Nov. 28, 1904 and Jan 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,000.00
	Central Railroad Company of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$8,800.00 per annum		
	Central Railroad Company of New Jersey	July 1, 1909 to Nov. 28, 1914	\$1,200.00 per annum	Action of the Commissioner June 2, 1909; approved by the Sinking Fund June 11, 1909	\$1,200.00
	Central Railroad Company of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$1,320.00 per annum	Action of the Commissioner Aug. 8, 1911 and May 1, 1912	\$1,995.80
	Central Railroad Company of New Jersey	At pleasure of the Commissioner	\$1,995.80 per annum		

## Plaintiffs' Exhibit No. 79.

1914 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
150 feet on the north side inner end of pier 79	New York Butchers' Dressed Meat Company	April 1, 1904 to April 1, 1914	\$1,575.00 per annum	Action of the Commissioner, May 4, 1904; approved by the Sinking Fund March 16, 1904	\$1,693.14
150 feet north side of pier 79 at West 39th Street, beginning at a point 150 feet from the inner end and extending westerly	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,732.50 per annum	Action of the Commissioner, June 19, 1908; approved by Sinking Fund June 30, 1908	\$1,935.00
300 feet north side inner end of pier at 39th Street	New York Butchers' Dressed Meat Company	July 1, 1908 to April 1, 1914	\$1,800.00 per annum		
277 feet north side of pier 79 at West 39th Street, for manure dump.	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$1,980.00 per annum		
Land under water from platform southerly about 66 feet from West 40th Street.	New York Horse Manure Transportation Company	Jan. 1, 1915 to April 1, 1924	\$3,712.50 per annum	Action of the Commissioner, Nov. 25, 1914; Approved by the Sinking Fund Dec. 2, 1914	.....
100 feet south inner end of approach to pier at West 40th Street.	Burns Brothers	July 1, 1907 to July 1, 1912	\$3,000.00 per annum	Action of the Commissioner, May 31, 1907 and May 12, 1912; approved by the Sinking Fund June 5, 1907	\$3,300.00
250 feet on the northerly side of approach to pier at West 40th Street	Burns Brothers	July 1, 1912 to July 11, 1917	\$3,300.00 per annum	Action of the Commissioner, May 1, 1913 and May 1, 1914	\$365.76
Outer 700 feet of pier at the foot of West 40th Street	Burns Brothers		\$365.75 per annum		
	New York Stock Yards Company and Weehawken Stock Yard Company		\$1,000.00 per annum	Action of the Commissioner, Oct. 11, 1912 and May 1, 1913	\$1,083.32
South side outer end and surface of pier at West 41st Street, together with 75 feet on the north side outer end	Central Railroad of New Jersey, Dec. 21, 1912, permit to sublet to Manhattan Navigation Company		\$350.00 per month	Action of the Commissioner, May 1, 1913 and May 1, 1914	\$3,150.00
South side inner end and surface of pier foot of West 41st Street, 95 feet	Central Railroad of New Jersey, Dec. 21, 1912, permit to sublet to Manhattan Navigation Company	Feb. 1, 1912 to Feb. 1, 1922	\$18,900.00 per annum	Action of the Commissioner, June 25 1909 and Jan. 30, 1912; approved by the Sinking Fund June 30, 1909	\$18,900.00
158 feet of south side inner end of pier at West 41st Street	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Feb. 1, 1922 to Feb. 1, 1932	\$20,790.00 per annum		
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Feb. 1, 1932 to Feb. 1, 1942	\$22,869.00 per annum		
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Nov. 28, 1904 to Nov. 28, 1914	\$8,000.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,206.75
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$8,800.00 per annum	Action of the Commissioner June 2, 1909; approved by the Sinking Fund June 11, 1909	\$1,213.65
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	July 1, 1909 to Nov. 28, 1914	\$1,200.00 per annum		
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$1,320.00 per annum	Action of the Commissioner, Oct. 2, 1903; approved by the Sinking Fund Oct. 29, 1913	\$2,035.44
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Nov. 1, 1913 to Nov. 28, 1914	\$1,995.80 per annum		
	Eben E. Olecott, permission to sublet portion of the pier to the Central Railroad of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$2,195.38 per annum		

## Plaintiffs' Exhibit No. 90.

1915 NORTH RIVER DESCRIPTION OF PROPERTY	LESSEE OR OCCUPANT	TERM OF TENANCY	RENT	RIGHT OF TENANCY	RECEIVED
300 feet north side inner end of pier foot of 39th Street	New York Butchers' Dressed Meat Company	April 1, 1914 to April 1, 1924	\$3,712.50 per annum	Action of the Commissioner, Nov. 25, 1914; approved by the Sinking Fund Dec. 2, 1914	\$3,712.50
277 feet north side of pier 79 for manure dump	New York Horse Manure Transportation Company	July 1, 1912 to July 1, 1917	\$3,300.00 per annum	Action of the Commissioner, May 31, 1907 and Mar. 12, 1912; approved by the Sinking Fund June 5, 1907	\$3,300.00
Land under water for platform about 66 feet from 40th Street	Burns Brothers	Revocable permit	\$365.75 per annum	Action of the Commissioner, May 1, 1915	\$365.75
100 feet south side inner end of approach to pier at 40th Street	Burns Brothers	Revocable permit	\$1,350.00 per annum	Action of the Commissioner, May 1, 1915	\$1,262.50
Outer 700 feet of pier foot of 40th Street	Central Railroad of New Jersey, Dec. 21, 1910, permit to sublet to Manhattan Navigation Company	Feb. 1, 1912 to Feb. 1, 1922 Feb. 1, 1922 to Feb. 1, 1932 Feb. 1, 1932 to Feb. 1, 1942	\$18,900.00 per annum \$20,790.00 per annum \$22,869.00 per annum	Action of the Commissioner, June 25, 1909 and Jan. 30, 1912; approved by the Sinking Fund June 30, 1909	\$18,900.00
250 feet on northerly side of approach to pier 40th Street	New York Stock Yards Company and Weehawken Stock Yards Company	Revocable permit	\$350.00 per month	Action of the Commissioner, May 1, 1915	\$5,250.00
South side inner end of pier at 41st Street, 95 feet	Central Railroad of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$1,320.00 per annum	Action of the Commissioner, June 2, 1909; approved by the Sinking Fund June 11, 1909	\$1,320.00
158 feet on south side inner end of pier at 41st Street	Central Railroad of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$2,195.38 per annum	Action of the Commissioner, Oct. 2, 1913; approved by the Sinking Fund Oct. 29, 1913	\$2,195.38
South side outer end and surface of pier at 41st Street, together with 75 feet in the north side outer end	Eben E. Olcott, permission to sublet portion of pier to Central Railroad of New Jersey	Nov. 28, 1914 to Nov. 28, 1924	\$8,800.00 per annum	Action of the Commissioner, Dec. 12, 1903, Nov. 28, 1904 and Jan. 31, 1905; approved by the Sinking Fund Dec. 16, 1903	\$8,800.00





**Plaintiffs' Exhibit No. 81.**

1465

SUPREME COURT,  
NEW YORK COUNTY.

EDGAR S. APPLEBY and JOHN S.  
APPLEBY, individually and as  
executors under the Last Will  
and Testament of Charles E.  
Appleby, deceased,

Plaintiffs,

*against*

THE CITY OF NEW YORK,  
Defendant.

1466

TO:

HON. WILLIAM A. PRENDERGAST,  
Comptroller of the City of New York.

SIR:

YOU ARE HEREBY NOTIFIED that Edgar S. Appleby and John S. Appleby, individually and as executors of the last Will and Testament of Charles E. Appleby, deceased, have a claim and demand against the City of New York in substance as follows:

1467

Said Edgar S. Appleby and John S. Appleby are the only heirs at law and next of kin of Charles E. Appleby, deceased and are the devisees in his last Will and Testament which was duly probated in Monmouth County, New Jersey and a certified copy filed in the office of the Clerk of New York County of all the real and personal property of said Charles E. Appleby, deceased.

The claimants and their testator and predecessor in title are and were the owners of the two blocks

1468

*Plaintiff's Exhibit 81*

- of land under water between 12th and 13th Avenues, 39th and 40th Streets, 40 and 41st Streets, in the Borough of Manhattan New York City and have owned said property together with the wharfage, rights, privileges, emoluments, crange, and dockage, and easements in said streets and avenues, continuously since on or about the year 1853. Said land under water was granted and conveyed to claimants' testator or their predecessor in title by the Mayor, Aldermen and Commonalty of the City of New York, predecessor of the City of New York, for a specified sum of money, the then fair value of said property. There was also conveyed and granted to plaintiffs' testator and predecessor in title, the right to fill in the lands under water and also the right to make and fill streets when required upon observing certain covenants mentioned in the said grant from the Mayor, Aldermen and Commonalty of the City of New York, which covenants the claimants and their testator or predecessor in title have always duly complied with, but they have not been required or permitted to fill in the said streets.
- Without notice to them and without compensation to them the City of New York has built piers in said streets and erected thereon certain buildings, sheds, destroying and impairing the easements of light, air and access in said streets which were granted to claimants' testator and predecessor in title and which are now owned and rightfully belong to your claimants and the lands under water have been wrongfully converted into and are used as slips and basins by the City of New York, its lessees, tenants and assigns, for approach and access to said piers and for mooring, floating, docking and keeping boats, floats and water craft of said City, its lessees, tenants, departments, agents and assigns.

*Plaintiff's Exhibit 81*

1471

The said City of New York, through the Department of Docks thereof has received sums of money and other advantages and emoluments, rents, issues and profits from the use and occupation of claimants' lands under water and has deprived claimants and their testator of the use thereof and of his and their easements of light, air and access in said streets and avenues and has deprived the public of access to the water front at the westerly end of said streets to the exclusive use of said City, its tenants, lessees and assigns, all of which was wrongful, illegal, improper, without authority of law, against the will and without the consent of your claimants, their testator and predecessor in title.

1472

That it is the duty and obligation of the City of New York to allow your claimants to fill in and make the said lands and streets and that said City by its acts, and by constructing said piers, renting and leasing the same, have made it impossible for claimants to do so, and that the City of New York should cancel and annul all leases, agreements, licenses and permits in any wise or manner affecting claimants' rights to the said lands and streets hereinbefore mentioned, and should remove the sheds, buildings, piers, and obstructions therefrom and should account to the claimants for all manner of wharfage, crantage, dockage, advantages, emoluments, rents, profits, issues and income received by said City of New York, its predecessor or assigns or any department, agent, officer or board of said City from any person, persons, corporation, firm, association, company, organization, individual or any source whatever. Claimants are unable to state the amount thereof, but assert that it is many plete accounting thereof, which is necessary before said amount can be known to them.

1473

1474

*Plaintiff's Exhibit 81*

The damages and injuries complained of have been constant and continuous for a period as claimants are informed, of about ten years last past and have been commenced and continued under the cloak of a condemnation proceeding instituted in 1894 by the Mayor, Aldermen and Commonalty of the City of New York against the said lands of said Charles E. Appleby and demand has been made by claimants and their testator, Charles E. Appleby, that the City of New York proceed with said condemnation proceeding which demand has not been complete with and it is evident, that said City of New York does not intend in good faith to proceed with said condemnation proceeding.

1475

You are also notified that your claimants intend to commence such actions and proceedings against the City of New York as may be necessary for their proper relief herein.

Dated, New York, July 30, 1914.

Yours, &c.,

1476

EDGAR S. APPLEBY and JOHN S. APPLEBY individually and as executors of the last Will and Testament of Charles E. Appleby, deceased, by Banton Moore, Attorney,

1 Liberty Street,  
Borough of Manhattan,  
New York City.

STATE OF NEW YORK,    }  
COUNTY OF NEW YORK, } ss.:

EDGAR S. APPLEBY AND JOHN S. APPLEBY, being duly sworn depose and say that they are the claimants above named; that they have read the foregoing claim and know the contents thereof

*Plaintiff's Exhibit 81*

1477

and that the same is just, true and correct and that there are no offsets or counterclaims against the same within the knowledge of deponents.

EDGAR S. APPLEBY,  
JOHN S. APPLEBY,

Sworn to before me this  
30th day of July, 1914.

Thomas K. Mahlon,  
Commissioner of Deeds  
City of New York

1478

STATE OF NEW YORK }  
CITY OF NEW YORK } ss. :  
COUNTY OF NEW YORK }

THOMAS K. MAHLON of County of Kings, being duly sworn, deposes and says that he is over the age of 21 years; that on the 31st day of July, 1914, at the Municipal Building, in the Borough of Manhattan, City of New York, he served the foregoing notice of claim upon Wm. Prendergast, Comptroller of the City of New York delivering to and leaving personally with Hubert L. Smith, Deputy Comptroller a true copy thereof. 1479

Deponent further says, that he knew the person so served as aforesaid, to be the person mentioned and described in said notice of claim as the therein.

Sworn to before me this }  
day of , 191 . }

Notary Public,  
Commissioner of Deeds,  
New York City.

1480

**Plaintiffs' Exhibit No. 82.**

O. #16205.

S. O. 15743.

January 20th, '96.

G. S. GREENE, Jr., Esq.,  
Engineer-in-Chief.

Sir:

In obedience to within order the remaining piles,  
Etc., of the old Pier at 39th St. N. R. were removed  
by the Departments force in substantial accordance  
with report on S. O. #15702.

1481

Begun December 12th, '95. Finished Jany. 17, '96.

Very Respectfully,

Your Obedient Servant,

DAVID F. McCARTHY,  
Supt. of Repairs.

File N.

Endorsed on back

S. O. 15743

PIER AT 39TH STREET, N. R.

1482

Remove all piles remaining portion of old pier.

Dec. 6, '95.

Jan. 20, '96.

D. F. McC.

*Plaintiff's Exhibit 82*

1483

## DEPARTMENT OF DOCKS.

New York, 6th December, 1895.

O. 16205.

S. O. 15743.

Mr. DAVID F. MCCARTHY,  
Supt. of Repairs.

Sir:

You will please remove the piles remaining of the old Pier at 39th Street, North River, in accordance with my report on S. O. 15702.

1484

Very Respectfully,

Your Obedient Servant,

G. S. GREENE, JR.,  
Engineer-in-Chief.

"That the Pier, or rather what remains of the Pier being now the property of the City, I recommend that the old piles, which are about all that remains of the Pier, be removed, which will cost about \$650."

1485

1486

**Plaintiffs' Exhibit No. 83.**

Letterhead of  
CITY OF NEW YORK, DEPARTMENT OF DOCKS.  
Pier "A," N. R. Battery Place.

New York, Nov. 20, 1890.

CHARLES E. APPLEBY,

Owner of bulkhead and water rights  
bet. West 40th and West 41st Streets,  
N. R. and upland easterly thereof.

Sir:

1487

By direction of the Board governing this Department, you are hereby notified that if the work of dredging and removing rotten timber and old rafts in the slip between West 40th and West 41st Streets, North River, is not commenced within ten days after receipt of this notice, in accordance with order of the Board dated January 25th, 1890—the said work will be done by this Department at your cost and expense, and the cost thereof assessed upon the property owned by you, as provided by Sections 721 and 882 of the New York City Consolidation Act of 1882.

1488

Yours respectfully,

AUGUSTUS T. DOCHARTY,  
Secretary.



**Plaintiffs' Exhibit No. 84.**

1489

New York, November 21, 1890.

To:

The Department of Docks,  
New York City.

Gent.:

In reply to your communication of 20th instant (this day received) in regard to dredging & removing rotten timber and old rafts in the slip between 40th & 41st Streets. I will state what I have before stated to you that the place directed to be dredged, &c., is the 12th Avenue, a public highway vested in the City—and also the River Street shown as such on the plan of your Department. That the rotten timber and old rafts were not placed there by me or by my sanction. That by the terms of my grant from the City my obligation to is "to fill in" and not to excavate. And that I shall contest your right to dredge out the land at my expense especially as the work is desired to be done for the sole benefit of the piers, the income from which is received by you.

1490

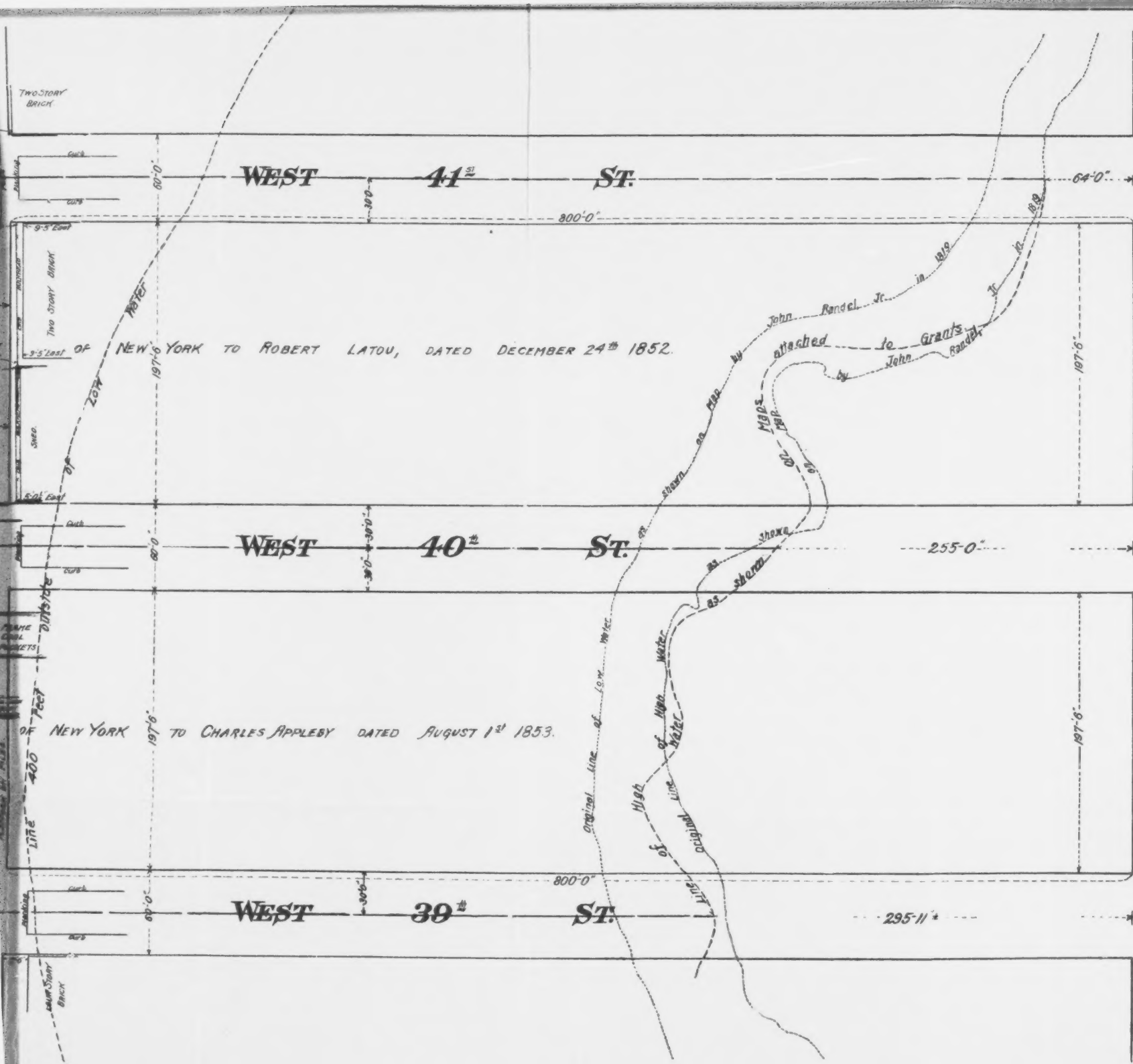
And while on this subject I will add that my grant on both sides of 41st Street extend to the Westerly side of the Thirteenth Avenue. And that the only reservation to the City contained in the grants is of the wharfage and cramage to arise from the end of the street beyond the Thirteenth Avenue. And I claim that your present pier inside of the Thirteenth Avenue, is there in violation of my grants.

1491

Yours Respy.

CHARLES E. APPLEBY.



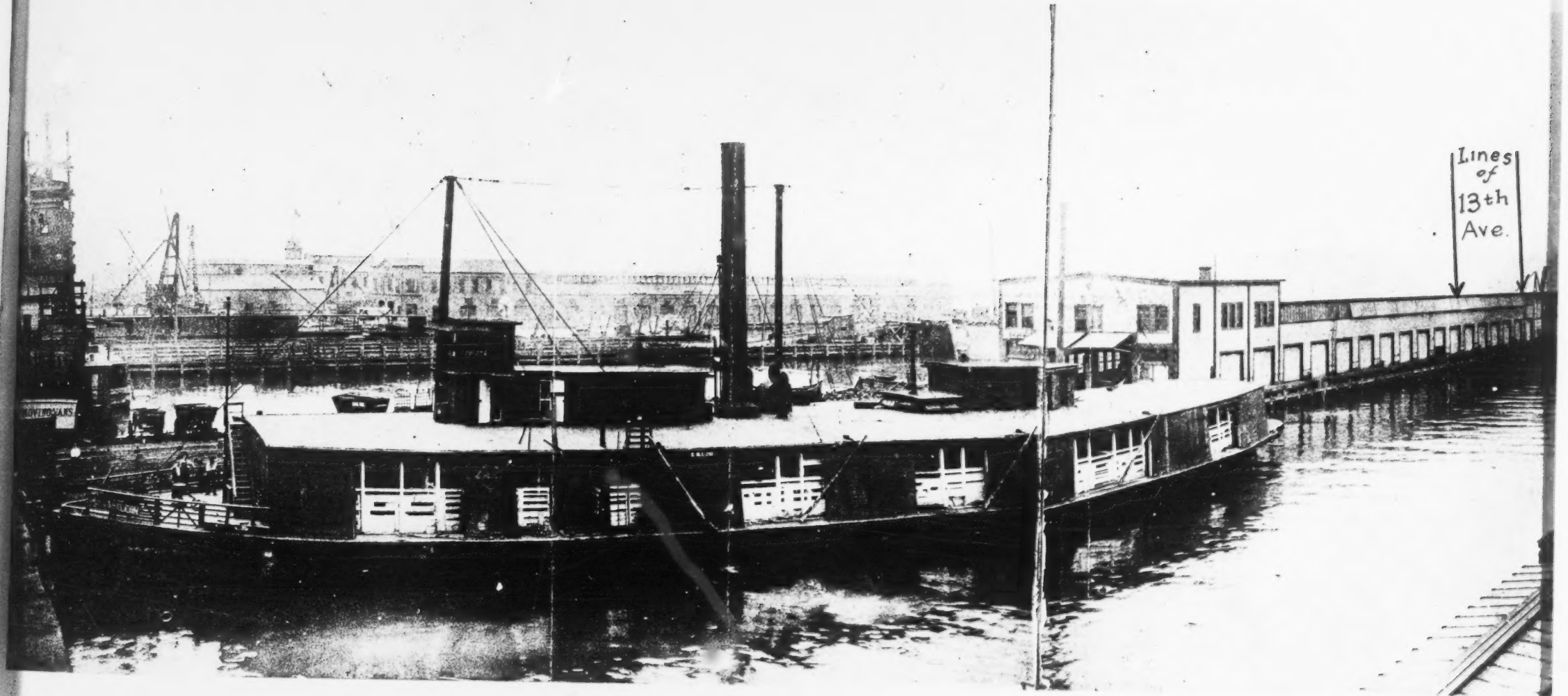


AVE.

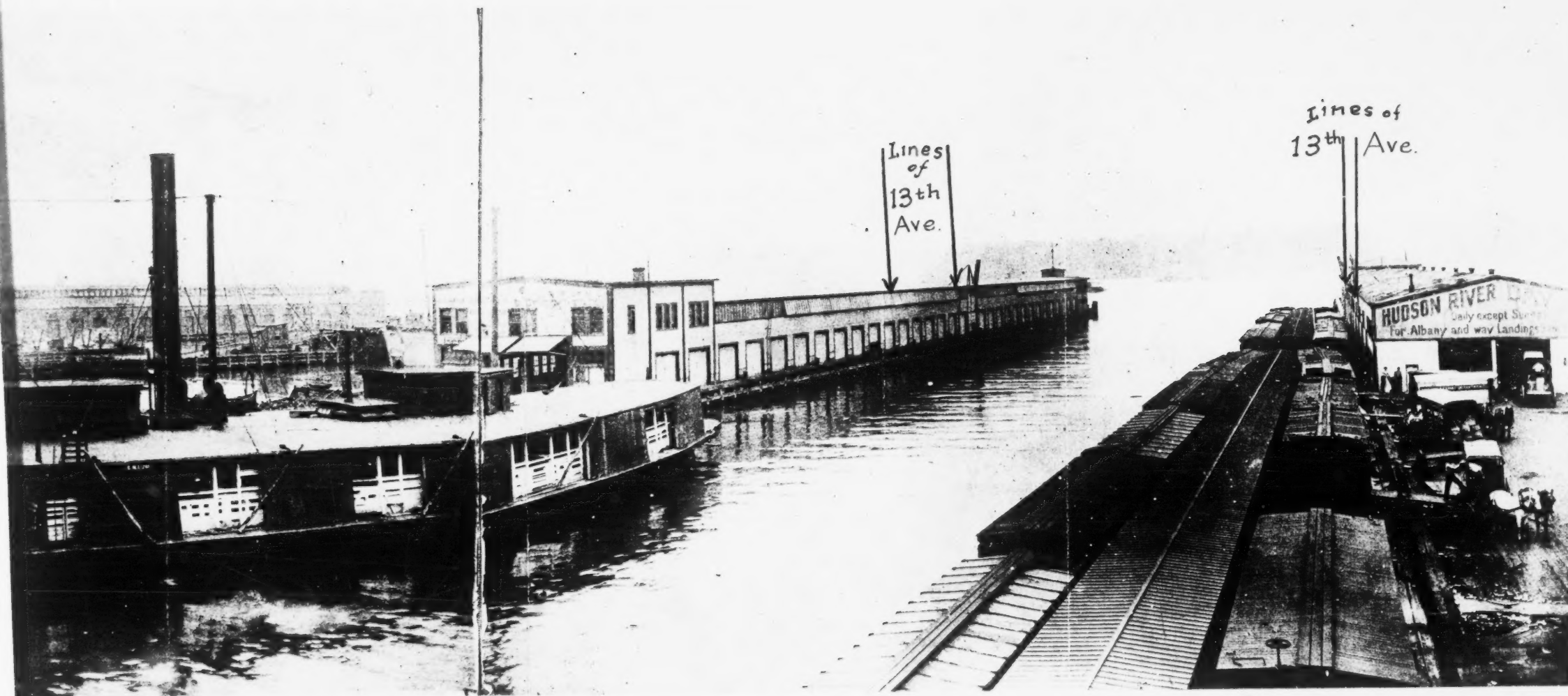
ELEVENTH

NEW YORK, AUGUST 11<sup>th</sup> 1914  
 SURVEYED BY  
*Francis W. Wade* Sines.  
 CITY SURVEYORS  
 No. 8 James St.  
 Successors to Francis K. Ford

Scale: - 40 Feet to One Inch.

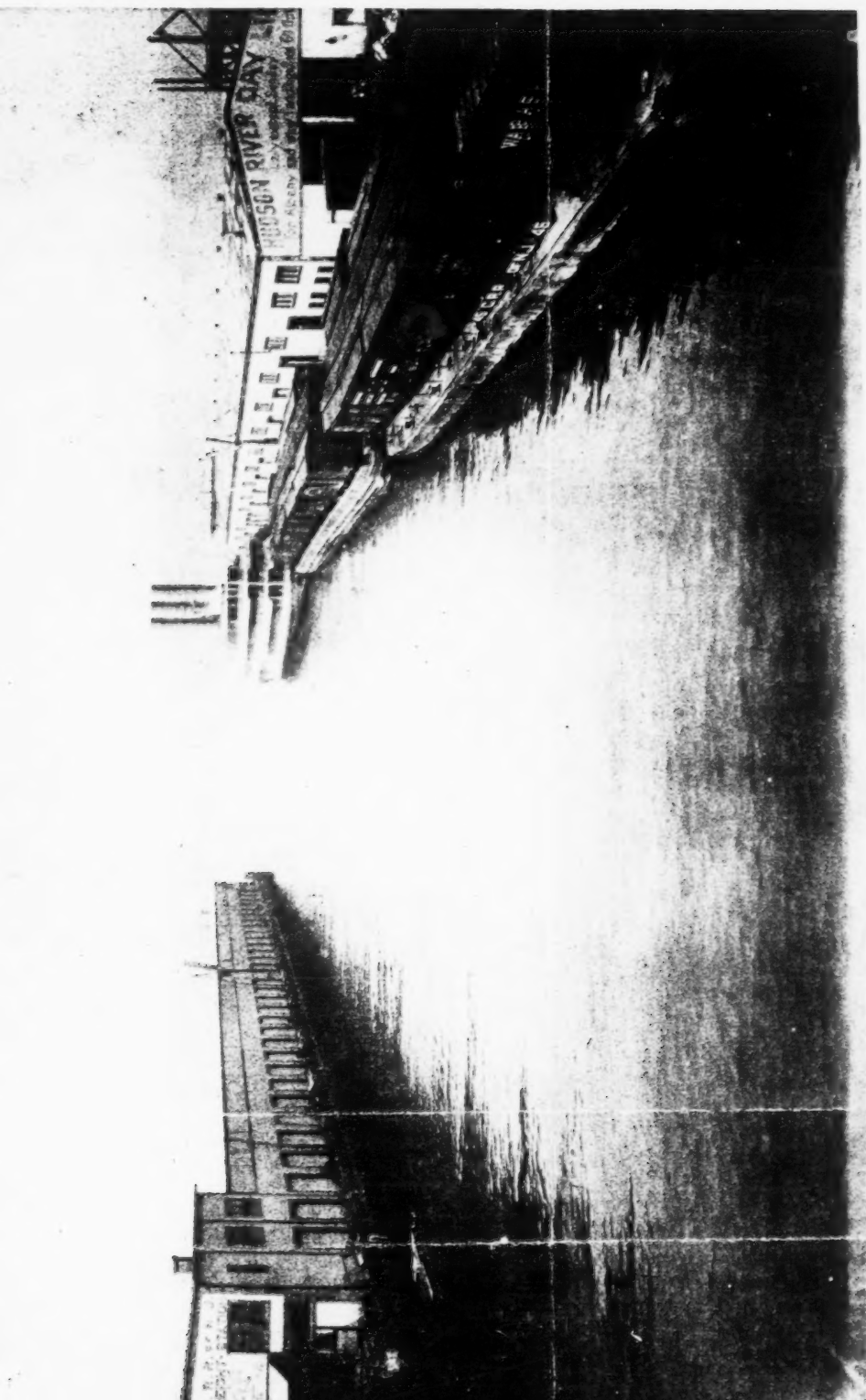


Lines  
of  
13th  
Ave.

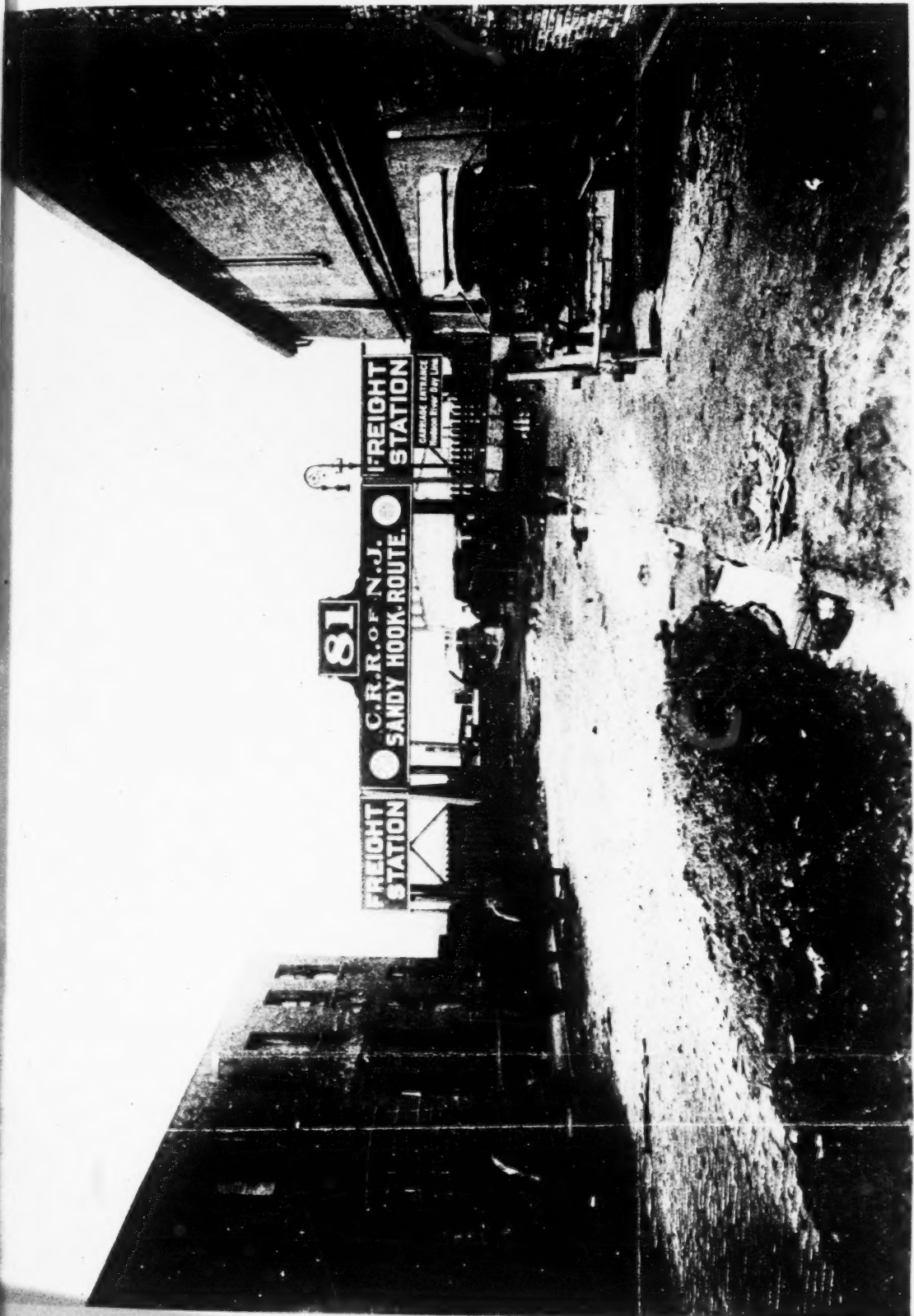




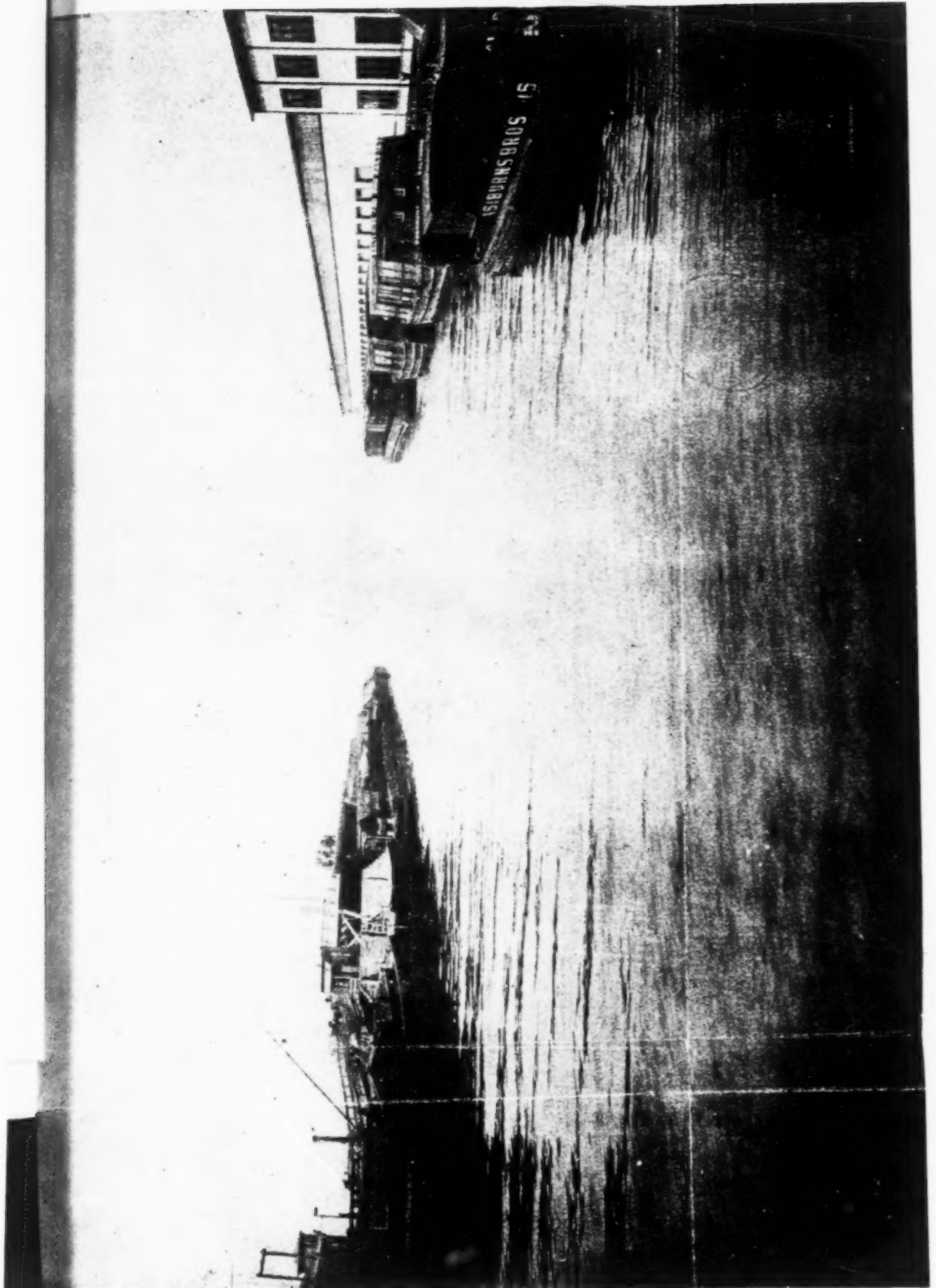
PLAINTIFFS' EXHIBIT No. 87



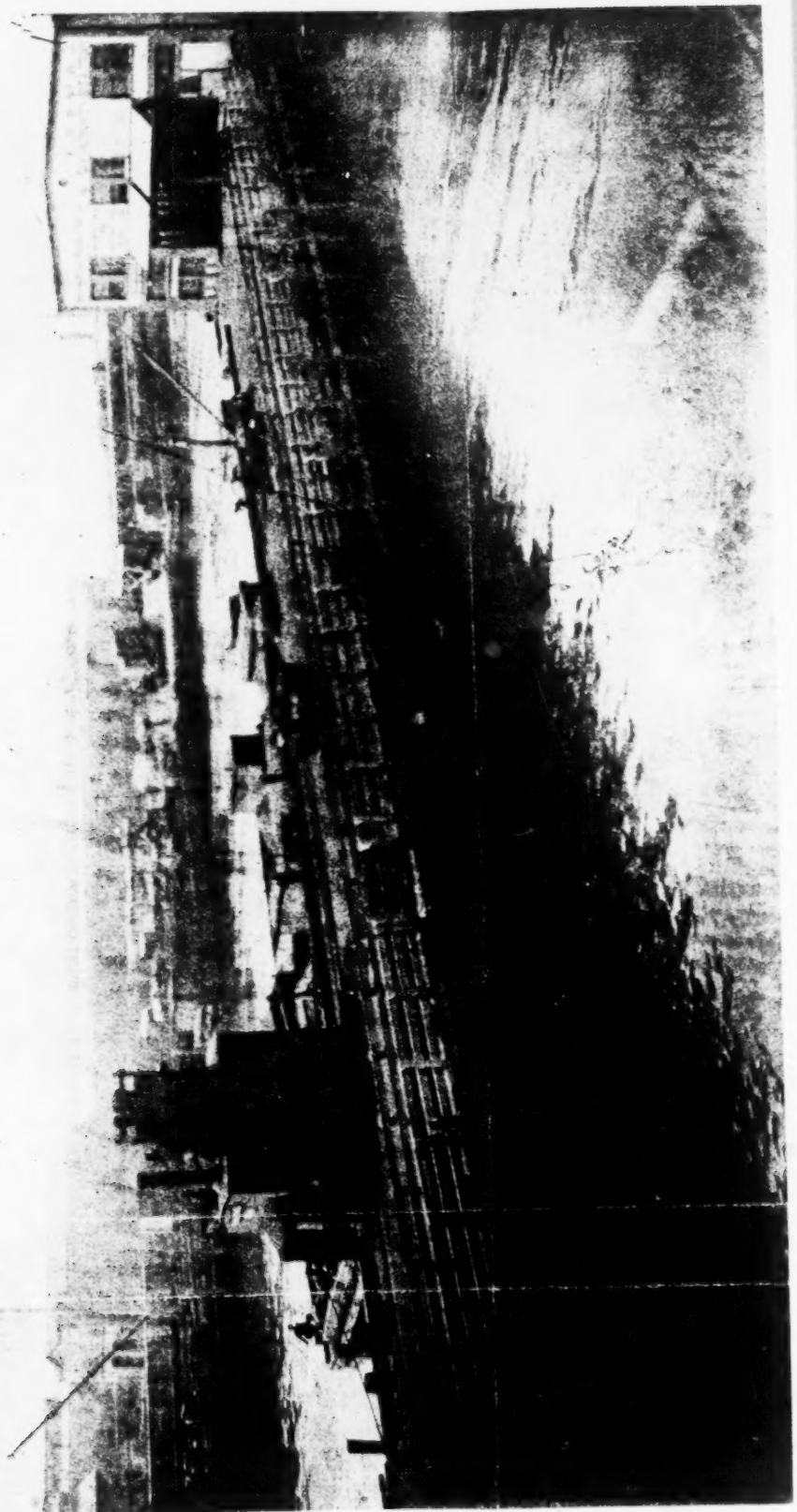
PLAINTIFFS' EXHIBIT No. 88



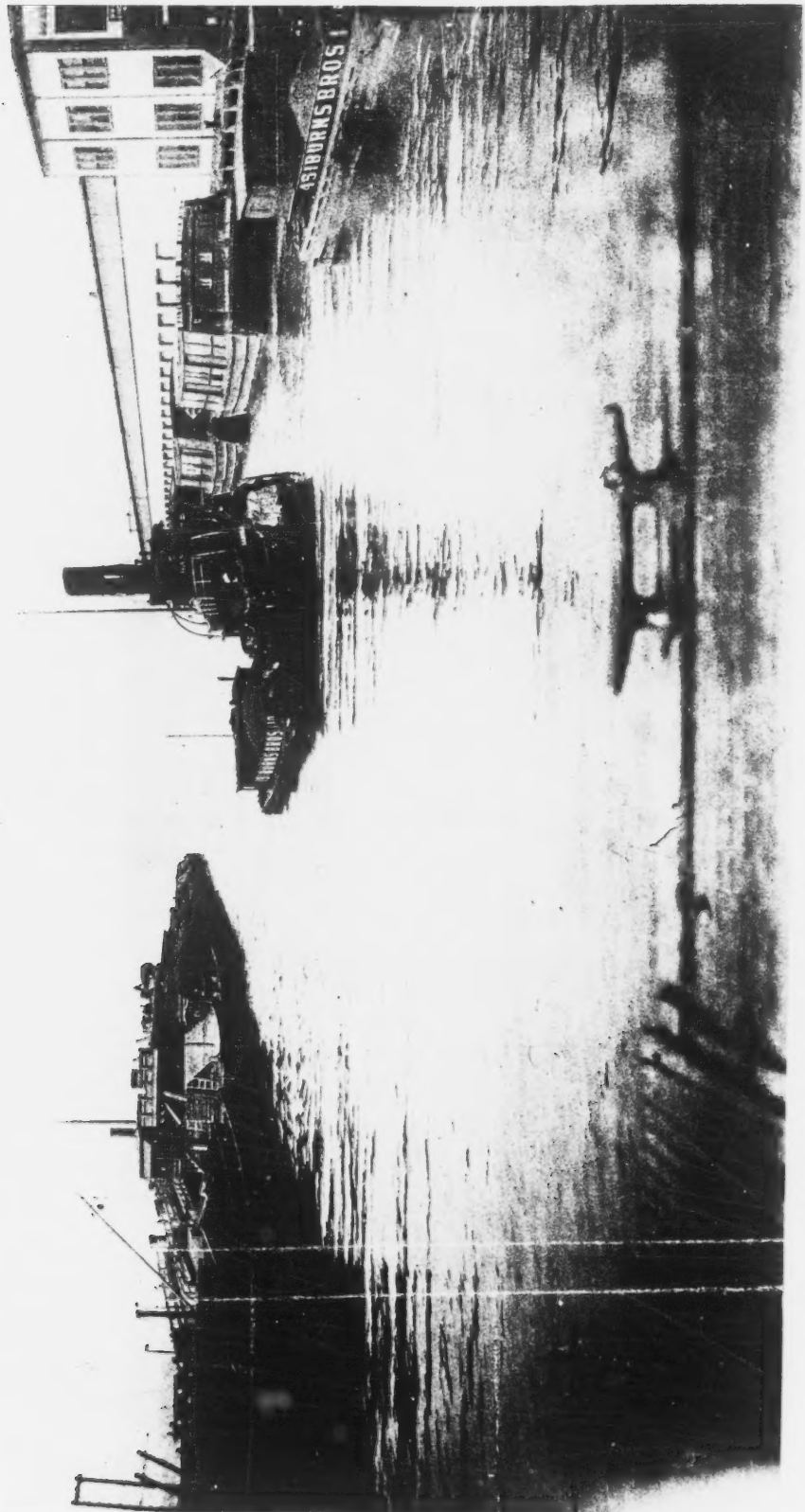
PLAINTIFFS' EXHIBIT No. 89







PLAINTIFFS' EXHIBIT No. 91



**Plaintiffs' Exhibits Nos. 92 and 93. 1537**

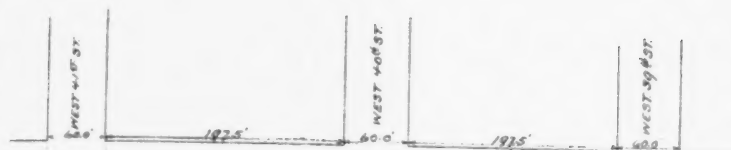
The records of the cases on appeal in the Court of Appeals in the two actions entitled "The City of New York v. Edgar S. Appleby and another."

These were actions brought to foreclose the transfer of tax liens composed of items of taxes affecting the property herein, which actions were finally determined by the Court of Appeals and the taxes paid to the City of New York and the transfer of tax liens duly cancelled of record.

1538

1539

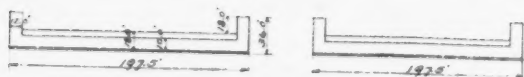
# PLAINTIFFS' EXHIBIT No. 94



PLAN  
Scale 1"=800'

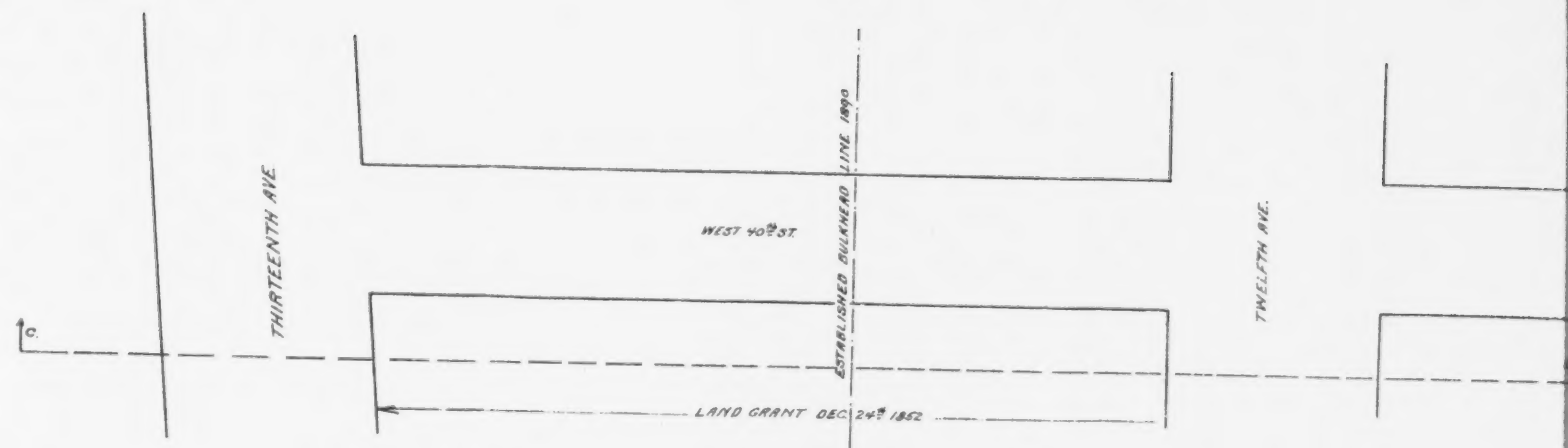


TYPE 'A'

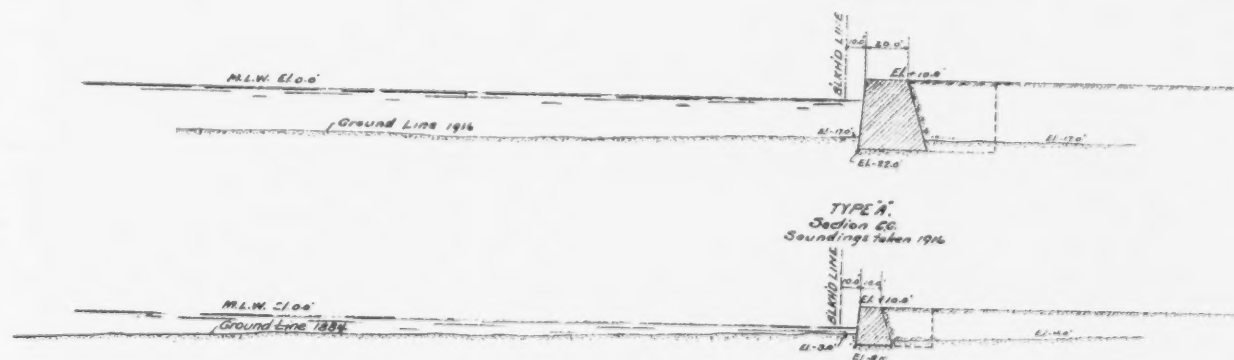


TYPE 'B'

TYPE	Crib above M.L.W.			Crib below M.L.W. plus deck and crib			Entire Crib
	Cu ft	cost	Total cost above M.L.W.	Cu ft	cost	Total cost below M.L.W.	
A	84,900	.13	\$11,237.00	334,360	.11	\$36,779.60	\$48,016.60
B	48,190	.13	\$6,264.70	69,710	.11	\$7,668.10	\$13,932.80



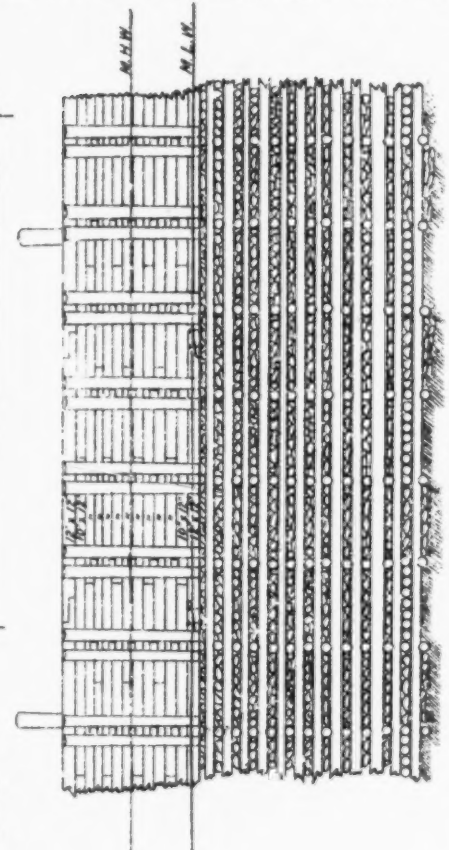
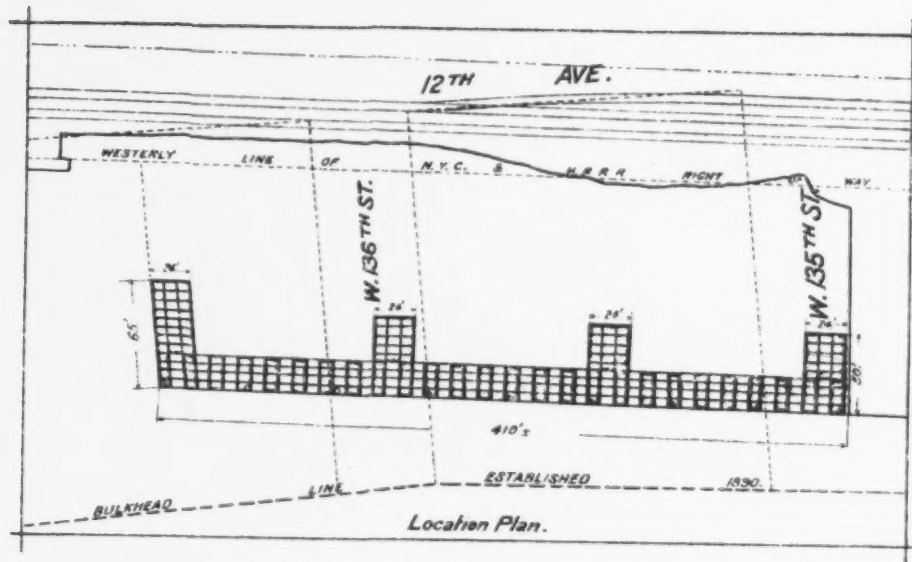
PLAN  
Scale 1"=400'



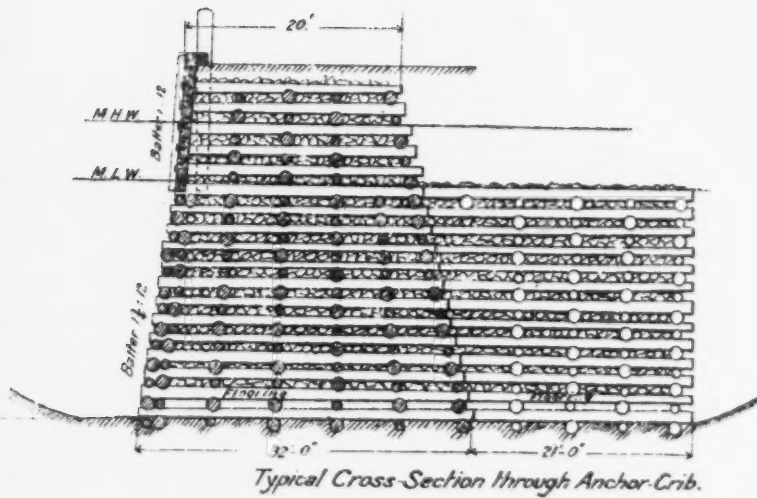
TYPE 'A'  
Section CC  
Soundings taken 1916



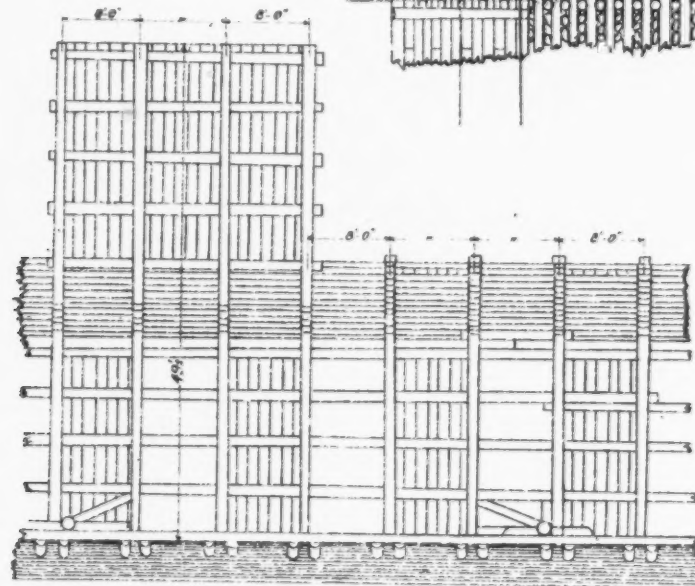
TYPE 'B'  
Section CC  
Soundings taken 1916



Part Front Elevation.



Typical Cross-Section Through Anchor-Crib.



(Plan at Anchor-Crib)

Part Plan.

Scale 1/16 in = 1 ft.

Type of Crib Bulkhead as built between W. 135th & W. 137th St's N.R.

*[Signature]*  
Assistant Engineer

Nov 27 '16

**Plaintiffs' Exhibit No. 97.**

1555

Charles E. Appleby

To John L. Appleby, Dr.

1853

June, July To Cost of Repairing Bulk-  
and August. head and filling with stone  
41 and 42d Sts. as per a/c  
rendered

\$ 750.00

Cost of 7664 yards of Earth  
filling at 27½c per yard per  
a/c rendered

2107.60

Paid for Wheeling plank

12.24 1556

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 \$2869.84

Received payment

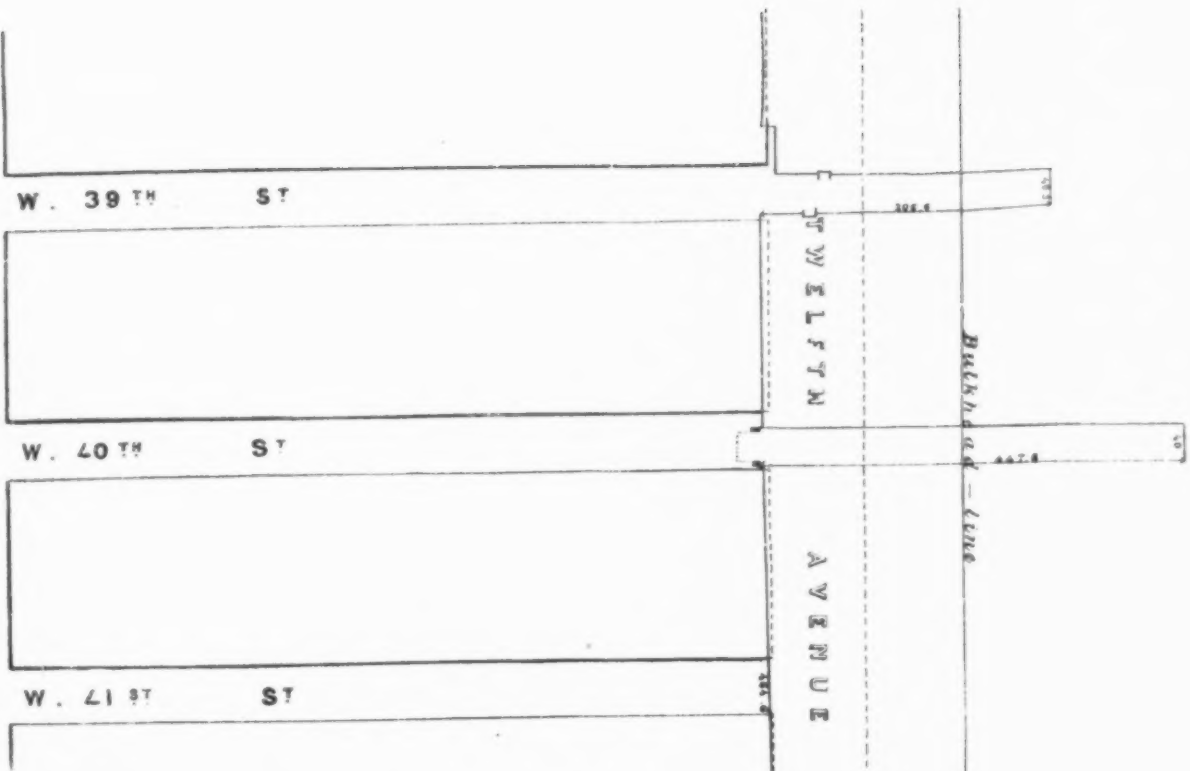
November 16, 1853.

John L. Appleby.

1557

DEFENDANTS' EXHIBIT A

*Pier - line*



ELEVENTH AVENUE

DEFENDANT S' EXHIBIT B.

*Copied from the Atlas of the*  
**HARBOR COMMISSIONERS**

BY

A. KURTH &amp; ROSA

Civil Engineers &amp; Surveyors

Nº 95 Beaver St. N. Y.

*Copied — December 7th, 1915*

HUDSON

Sheet No 6.

from W. 32<sup>nd</sup> St. to W. 46<sup>th</sup> St.

Scale 80 feet to 1 inch.

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Ε	Ε	Ν	Υ	Α	Ε

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**Defendants' Exhibit B-1.**

1573

**MEMORANDUM**

relating to MAPS OF HARBOR COMMISSIONERS and  
DESCRIPTION OF SAID MAPS.

In 1855 a commission was appointed by the Legislature to report upon the encroachments of the NEW YORK HARBOR and to establish the PIER LINES beyond which the encroachments should not be permitted.

Said commission addressed itself to Superintendent BACHE then Superintendent of the U. S. COAST Survey at Washington, D. C., and an agreement was made by which the Coast Survey was to furnish a full and original survey of NEW YORK HARBOR and the cost of the same was to be divided between the U. S. Coast Survey and the State of NEW YORK.

1574

The Commissioners laid down on these maps Pier and Bulkhead lines and made a report to the Legislature in 1857 which was adopted and this became law. The provisions of this law made it a duty to the commissioners to file one copy of Maps and Descriptions in the office of the Secretary of State which was done and another copy in the department of Street Commissioner, for which no funds were available. About 10 years later R. ROSA was ordered by the Street Commissioner to furnish a copy which is the one on file in this Office.

1575

October 31st, 1877.

Rudolph Rosa  
Surveyor, etc., 31 Pine St.

(Copied December 7th, 1915.)

**DEFENDANTS' EXHIBIT B-1 (Page 2).**

In pursuance of an act entitled "An act to establish Bulkhead and Pierlines for the Port of New York passed April 17th 1857, the Commissioners

1576

*Defendants' Exhibit B-1*

appointed under an act entitled "An act for the appointment of a Commission for the preservation of the Harbor of New York from encroachments and to prevent obstructions to the necessary navigation thereof" passed March 30th, 1855, do hereby declare and certify, that the said Bulkhead and Pierlines in the Port of New York, as adopted by the Legislature and laid down on the Maps made for the said Commissioner, and herewith deposited in the office of the Secretary of State, and entitled "Atlas of New York Harbor, made under the direction of the Harbor Commission" in two volumes (are) as follows, to wit:

1577

The Bulkhead line or line of solid filling, is hereby described as follows:

Beginning at a point in the eastern shore of the Hudson River at the entrance of Spuyten Duyvil Creek, being at a distance of 4114 feet westerly from the westerly side of the Xth Avenue, which is adopted as a Cave-line, and 16609 ft 6 inches northerly from the northerly side of 155th Street.

1578

Thence southerly along the present shore line to a point\*

N. 89. Thence southerly along the present shore to a point distant 110 ft westerly and perpendicular from a point in the westerly side of XIIth Avenue at the intersection of the XIIth Avenue and the northerly side of 89th Street.

N. 88. Thence southerly along the present shore to a point distant 114 ft westerly and perpendicular from a point in the westerly side of XIIth Avenue at the intersection of the XIIth Avenue and the northerly side of 88th Street.

N. 87. Thence southerly along the present shore to a point distant 100 ft westerly and perpendicular from a point in the westerly side of XIIth Avenue

*Defendants' Exhibit B-1*

1579

at the intersection of the XIIth Avenue and the northerly side of 87th Street.

Thence southerly in a straight line parallel to and 100 ft distant from the westerly side of XIIth Avenue to a point perpendicular to the westerly side of XIIth Avenue extended at its intersection with the westerly side of XIIIth Avenue.

S. 14. Thence southerly in a straight line to the point of intersection of the westerly side of XIIIth Avenue and the southerly side of 14th Street extended westerly. \*

1580

Given under our Hands at the City of New York this        day of May 1857.

George W. Patterson	}	Commissioners
Preston King		
Farner Bowen		
John Vanderbilt		
Jno. L. Taloot		

A true copy

New York 81 Warran Street Oct. 12th 1866

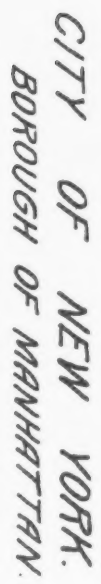
R. Rosa

Surveyor

1581

(Copied—December 7th, 1915.)

RIVER



*Extract from Map of Secretary of War  
prepared by the New York Harbor Line Board dated  
April 5, 1901, revised and corrected to Nov. 30<sup>th</sup> and  
Dec. 19<sup>th</sup> 1901, approved by the Assistant Secretary  
of War, Feb. 15<sup>th</sup> 1902.*

Dec. 1, 1915. #1518.

**MAPS**

**TOO**

**LARGE**

**FOR**

**FILMING**

1600

**Defendants' Exhibit G-1.****RESOLUTION AS TO PIER AT 39TH STREET.**

Vol. 18 p. 196—approved papers.

RESOLVED, that a water-grant at the foot of Thirty-ninth street, North river, be given to James N. Cobb, provided that he shall build at his own expense a good and substantial pier at the foot of the said street, under the direction of the Street Commissioner, the same to be completed in one year.

1601

Adopted by the Board of Aldermen, June 3, 1850.  
 Adopted by the Board of Assistants, June 8, 1850.  
 Approved by the Mayor, June 15, 1850.

**Defendants' Exhibit G-2.****RESOLUTION OF COMMON COUNCIL  
APPROVED PROCEEDINGS.**

Vol. 20, P. 235.

1602

RESOLVED, that the Street Commissioner be, and is hereby directed to cause to be built a pile pier, of one hundred feet in length, at the foot of Fortieth street, North river, the same to be used exclusively by the boats that carry offal from the city.

Adopted by the Board of Aldermen, May 10, 1852.  
 Adopted by the Board of Assistants, May 13, 1852.  
 Approved by the Mayor, May 14, 1852.

**Defendants' Exhibit G-3.**

1603

**APPROVED PAPERS.**

(Vol. 26, p. 488.)

"RESOLVED, That the pier at the foot of Fortieth street, North river, be extended four hundred feet beyond its present terminus, and that the Street Commissioner be, and is hereby directed to advertise for proposals therefor, and return the contract to the Common Council for confirmation."

Adopted by the Board of Aldermen, Dec. 22, 1858.

Adopted by the Board of Councilmen, Dec. 27, 1858.

Approved by the Mayor, Jan. 8, 1859.

1604

**Defendants' Exhibit G-4.**

(Vol. 35, p. 218.)

"RESOLVED, That the pier at the foot of Fortieth street, North river, be rebuilt; the same to be done under the direction of the Street Commissioner."

Adopted by the Board of Aldermen, Dec. 23, 1867.

Adopted by the Board of Councilmen, Jan. 6, 1868.

Approved by the Mayor, January 6, 1868.

1605



1606

**Defendants' Exhibit J.**

DEPARTMENT OF DOCKS AND FERRIES.

East 24th Street Office.

April 22d, 1904.

SUBJECT: Wall Movement at  
East 38th St. Section.

J. A. BENSEL, Esq.,  
Engineer-in-Chief.

Sir:

1607

I beg to report that the bulkhead wall at the East 38th Street Section has moved outshore at the extreme southerly end since March 10th, 1904, about .93 ft., making a total of 1.23 feet from its original alignment; the greatest movement having taken place since April 15th, 1904, when small, hairlike cracks were discovered on the E course backing, on one of the stretchers, about 60 ft. south from the angle at the southerly line of 38th Street. However, no crack appeared in the face of the wall. On April 20th, 1904, the crack had increased so that it was easily perceived, and also a crack was shown in a stretcher in the C course; the break carrying through the joint of the E course, and through a port opening for a pipe in the D course. There was also an angle in the wall which could be readily detected by alignment with the eye.

1608

The filling in progress was immediately stopped and alignments taken by the surveyors.

A blue print is sent herewith showing the movement in the wall since March 10th, 1904.

In addition to the crack in the wall it is manifest in the rear piles of the five last rows at the extreme southerly end that they have left the caps for about one foot, and the two southernmost piles, one in the close row, or end row, and one adjacent thereto,

*Defendants' Exhibit J*

1609

have disappeared entirely. Also, the rear four piles of the close row have left the caps anywhere from four inches to one foot. The bracing piles seem to have withstood the stress, and are still intact with their caps, as also have the other piles under the platform, so far as can be seen, although I am suspicious that several of the vertical piles adjacent to those which have settled have lost their supporting power to the platform.

The crib, which was placed as a bulkhead to retain the earth filling, running from the south end of the wall to the crib bulkhead on the southerly half of the block between 37th and 38th Sts., E. R., has also settled about 5 ft. from its original elevation immediately adjacent to the platform, and has tilted to the north to an angle of about 20 degrees. The westerly end of this crib has settled somewhat, but not nearly so much as the easterly end, and is likewise tilted.

1610

As to the cause of the present condition of this wall, which I consider serious, I think it is due to a certain sloping rock, which is indicated in the cross section of the pile penetration, which was shown in the driving of the piles for the rear 12 ft. of the southerly end of this section; there being an angle in the rock bottom of about 55 degrees from the horizontal in the rear 12 ft. of the pile cross section. For the other portion immediately east of this 12 ft. there is a rise of about 3 ft. in the shape of a knoll, and it is my impression that the pocket between this knoll and the rock slope was filled with soft material, which, when the earth filling was placed, the horizontal thrust caused these rear piles to slip down this slope, causing the settlement of the piles in the rear, thus weakening the platform by permitting less resistance therein than would otherwise have existed.

1611

1612

*Defendants' Exhibit J*

In addition to this, there was considerable mud over the bulkhead area at the southerly portion of this wall when the bottom was prepared with stone filling for the driving of piles; and I also think that the rip-rap and cobble filling was not of sufficient weight to expel all the mud between it and the hard bottom, and there is probably a layer of mud between the original hard bottom and the stone filling, all of which has a tendency to make the wall more easily moved from the horizontal pressure of the earth filling.

1613

On about April 1st, Mr. R. T. Betts, Asst. Engineer, called my attention to the disposition of the piles in the rear of this wall, which gave the first indication of its weakness, but at this time there was not perceptible to the eye any deflection in the alignment of the wall, nor was there any crack perceptible in the concrete backing of the E course, or in the granite.

1614

Acting upon this, I took the extra precaution of having another load of rip-rap (385 cu. yds.) deposited along the front of the wall at the southerly end, bringing it up to about minus 8 ft. below Mean Low Water adjacent to the wall, with a beam of 10 ft. to minus 12 ft., which is shown in soundings over the rip-rap taken April 8th, 1904, and on file in the office of the Surveyor.

As to the best remedy to prevent further movement of this wall, I would recommend, on the theory of the rip-rap embankment being suspended in a mud flotation, that derrick-stone be placed along the outer or easterly toe of the rip-rap embankment placed in front of the wall, for a distance of about 80 ft. north from the southerly end. Also, that the earth filling over the platform at the southerly 20 ft. of this wall be removed, together with the cap-

*Defendants' Exhibit J*

1615

decking, and that land-piles be driven to replace those which have settled.

I send you herewith sketch showing the approximate condition of the wall at the present time.

I also think that we can get a timber anchor tied between the platform and the crib, which will assist in holding it from further movement.

I do not think that the work of remedying this wall should be delayed for any considerable time.

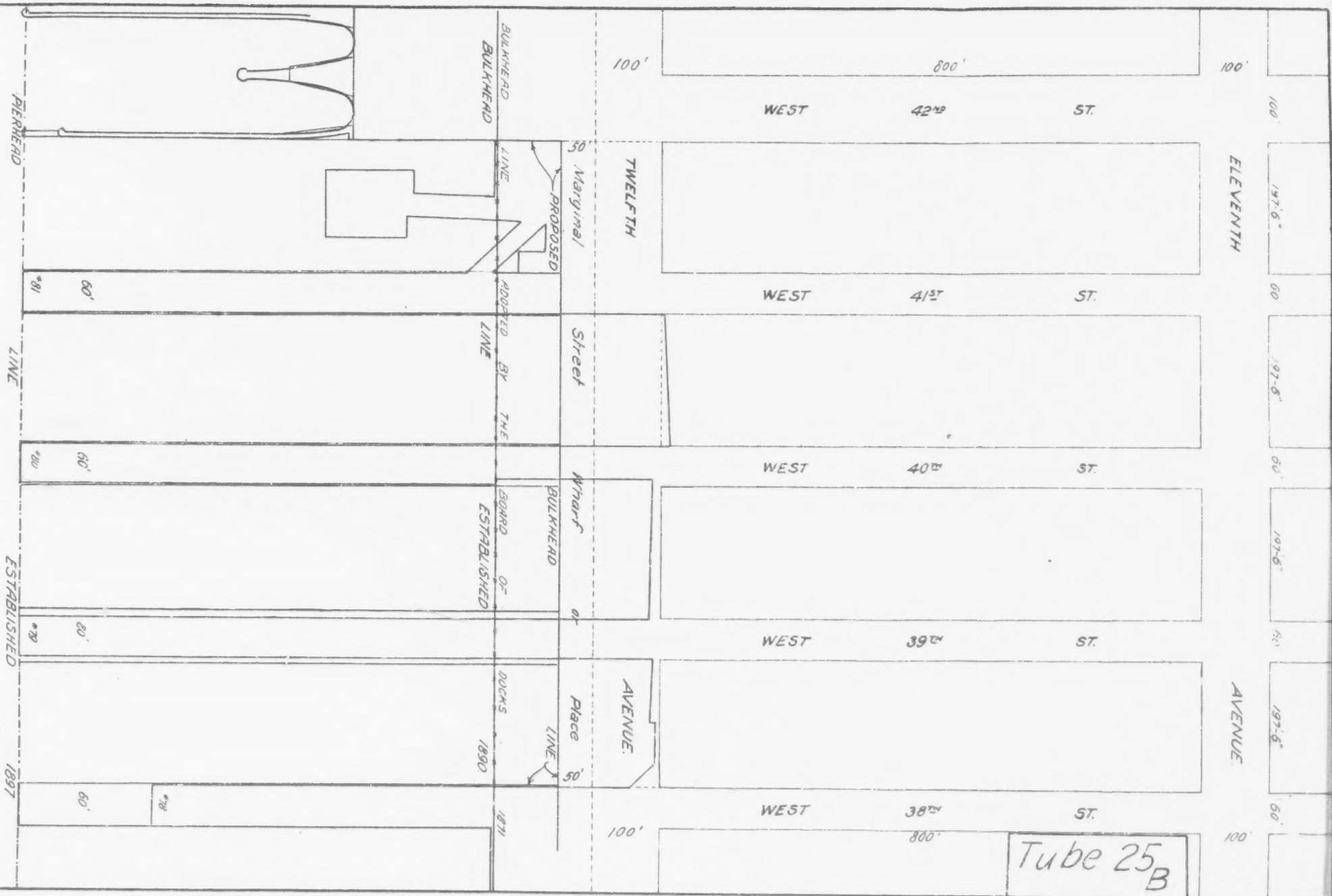
Yours very respectfully,

1616

(Signed) ALLEN N. SPOONER,  
Asst. Engineer.

1617

DEFENDANT'S EXHIBIT X  
FOR IDENTIFICATION



Bulkhead line to be discontinued shown thus —+—+—+—+—+—

Black lines show present structures.  
Green lines show amended new plan  
Red lines show proposed amendment to amended new plan.

The City of New York Department of Docks and Ferries  
Plan for the alteration and amendment of the amended  
new plan for improving the Waterfront and Harbor of  
the City of New York, on the North River, between  
W 36<sup>th</sup> St and W 42<sup>nd</sup> St Borough of Manhattan  
City of New York, Made in accordance with law.

Chief Engineer

Received. 11/14/14. 1916.

Mayor of the City of New York  
 " " "  
 Comptroller " " "  
 The Mayor

Miss Martha Chamberlain " " "

Frank A. House, President of the Board of Aldermen  
James P. Sawyer, Chairman of the Finance Committee  
of the Board of Aldermen

195107

Scale 1-100

He the Commissioners of the Sinking Fund of the City of New York, hereby certify that this plan, for the extension and improvement of the Grand Central Terminal, the new Metropolitan and Hudson of the City of New York, on the North Side, between W 34<sup>th</sup> St and W 42<sup>nd</sup> St, Borough of Manhattan, accepted by the Commissioners of the Sinking Fund, New York, June 1, 1906.



**Defendants' Exhibit Y for Identification.** 1627

**COMMISSIONERS OF THE SINKING FUND  
OF THE CITY OF NEW YORK.**

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Proceedings of the Commissioners of the Sinking Fund, at a Meeting Held in Room 16, City Hall, at 11 o'Clock A. M. on Thursday, June 1, 1916.

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1628

Present—Frank L. Dowling, President, Board of Aldermen; Alexander Brough, Deputy and Acting Comptroller; Milo R. Maltbie, Chamberlain; Francis P. Kenney, Chairman, Finance Committee, Board of Aldermen.

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The Minutes of the meetings held May 18th and 22nd, 1916, were approved as printed.

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1629

Dock Department—Amendment of the Amended New Plan for Improvement of the Waterfront Between W. 38th and W. 42nd St., North River, Borough of Manhattan.

The Chair called for a public hearing in the matter of the alteration and amendment of the amended new plan for the improvement of the water-front between W. 38th and W. 42nd sts., Borough of Manhattan, adopted by the Commissioner of Docks in accordance with law, May 1, 1916, and transmitted to the Commissioners of the Sinking Fund for approval. (Affidavit as to publication of Notice of Hearing in the CITY RECORD on file with the papers.)

1636

*Defendants' Exhibit Y*

The following was received from the Commissioner of Docks:

Pier A, North River, May 1, 1916.

*Amendment to New Plan, 38th to 42nd Sts.,  
North River.*

*Hon. JOHN PURROY MITCHEL, Mayor, Chairman of  
the Commissioners of the Sinking Fund:*

1631

Sir—I transmit herewith tracing and print, together with technical description, for the alteration and amendment of the amended New Plan between West 38th and West 42nd streets, North River, Borough of Manhattan.

The amendment consists in the discontinuance of the present bulkhead line between the northerly side of West 38th street and the southerly side of West 42nd street, and the establishment of a new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place.

1632

I have today adopted this amendment to the New Plan and respectfully submit it with the request that it be approved by the Commissioners of the Sinking Fund. Very truly yours,

R. A. C. SMITH, Commissioner of Docks.

No one appearing against the proposition, the Deputy and Acting Comptroller presented the following report and offered the following resolution:

May 26, 1916.

*To the Honorable the Commissioners of the  
Sinking Fund:*

Gentlemen—In a communication dated May 1st, 1916, the Commissioner of Docks transmitted for approval a plan for the alteration and amendment



*Defendants' Exhibit Y*

1633

of the amended New Plan for the improvement of the water-front and harbor of The City of New York between West 38th and West 42nd Streets, North River, Borough of Manhattan.

The proposed amendment consists in the discontinuance of the present bulkhead line between the northerly side of West 38th Street and the southerly side of West 42nd Street, and the establishment of a new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place.

By this amendment, the effective length of the piers is increased 100 feet, and there is still available a width of 50 feet for a marginal street, wharf or place. 1634

In the event of the Commissioners of the Sinking Fund approving the amended plan at the public hearing to be held, pursuant to chapter 372 of the Laws of 1907, the attached resolution is recommended for adoption approving the request. Respectfully,

ALEX BROUGH,

Deputy and Acting Comptroller.

Resolved, That the Commissioners of the Sinking Fund hereby approve of the plan for the amendment of the plan, for the improvement of the waterfront and harbor of The City of New York between the northerly side of West 38th Street and the southerly side of West 42nd Street, North River, Borough of Manhattan, as adopted by the Commissioner of Docks in accordance with law May 1, 1916. 1635

The report was accepted and the resolution adopted, all the members present voting in the affirmative.

The Chair then declared the hearing closed.

**1636 Stipulation and Order Settling Case.**

It is hereby stipulated and agreed that the foregoing case contains all the evidence given upon the trial of this action, and that the same be settled and ordered filed and annexed to the judgment roll herein on file in the office of the Clerk of New York County.

Dated, February , 1918.

BANTON MOORE,  
Attorney for Plaintiffs-Appellants.

**1637**

WILLIAM P. BURR,  
Corporation Counsel,  
Attorney for City of New York,  
Defendant-Appellant.

STETSON, JENNINGS & RUSSELL,  
Attorneys for Weehawken Stock Yard Company,  
Defendant-Appellant.

DEFOREST BROTHERS,  
Attorneys for Central Railroad  
Company of New Jersey, Defendant.

**1638**

FARRELL & ASCH,  
Attorneys for New York  
Butchers' Dressed Meat Co.

Upon the above stipulation the foregoing case on appeal containing all the evidence is hereby settled and ordered on file and annexed to the judgment roll on file in the office of the Clerk of the County of New York.

Dated, New York, February , 1918.

FRANCIS K. PENDLETON,  
*J. S. C.*

**Waiver of Certification and Stipulation. 1639**

Pursuant to Sections 1353 and 3301 of the Code of Civil Procedure, it is hereby stipulated by the parties hereto that the foregoing printed case on appeal contains true and correct copies of the notices of appeal, judgment roll, case and exceptions as settled, now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk of said County is hereby waived.

It is also stipulated that the exhibits not reproduced herein, or not printed in full, may be produced upon the argument of the appeal herein.

1640

Dated, February , 1918.

BANTON MOORE,  
Attorney for Plaintiffs-Appellants.

WILLIAM P. BURR,  
Corporation Counsel,  
Attorney for City of New York,  
Defendant-Appellant.

STETSON, JENNINGS & RUSSELL,  
Attorneys for Weehawken Stock Yard Company, 1641  
Defendant-Appellant.

DEFOREST BROTHERS,  
Attorneys for Central Railroad  
Company of New Jersey, Defendant.

FARREL & ASCH,  
Attorneys for New York  
Butchers' Dressed Meat Co.

1642

**Order Filing Case.**

Pursuant to Section 1353 of the Code of Civil Procedure, it is hereby

ORDERED, that the foregoing printed case on appeal be filed in the office of the Clerk of the Supreme Court, Appellate Division, First Department.

Dated, February , 1918.

FRANCIS K. PENDLETON,  
*J. S. C.*

1643

1644

AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT  
HELD IN AND FOR THE FIRST JUDICIAL DEPARTMENT, IN THE  
COUNTY OF NEW YORK, ON THE 20TH DAY OF JANUARY, 1922.

Present: Hon. John Proctor Clarke, P. J.; Hon. Frank C. Laughlin, Hon. Walter Lloyd Smith, Hon. Alfred R. Page, Hon. Edgar S. K. Merrill, Justices.

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as  
Executors of the Last Will and Testament of Charles E. Appleby,  
Deceased, Appellants,

against

THE CITY OF NEW YORK et al., Respondents.

#### ORDER AND JUDGMENT OF APPELLATE DIVISION

An appeal, as on file, having been taken to this Court by the plaintiffs, Edgar S. Appleby and John S. Appleby, and by The City of New York and Weehawken Stock Yards Company, defendants, from the judgment of the Supreme Court, New York County, herein, and from each and every part thereof, which judgment was entered and filed in the office of the Clerk of New York County on the 25th day of July, 1917, enjoining the City of New York, its agents, servants, contractors, representatives, etc., from excavating, dredging or removing the soil of plaintiff's premises, and also enjoining and compelling the taking down and removal of the over-hanging dumping board or platform erected on the northerly side of the pier in West 39th Street, and decreeing that the plaintiff should recover its costs from the defendant, The City of New York, and said appeal having been argued by Mr. Spotswood D. Bowers, of counsel for the appellants Edgar S. Appleby and John S. Appleby, and by Mr. Charles J. Nehrbas, Assistant Corporation Counsel, of counsel for the City of New York, and due deliberation having been had thereon, it is hereby unanimously

Ordered and adjudged that the judgment herein be modified by eliminating the provision thereof enjoining the excavating, dredging or removing of the soil of so much of plaintiffs' premises as are in the slips westerly of the bulkhead line established by the Secretary of War; and that said judgment as so modified be and the same hereby is affirmed without costs in this Court.

And this Court hereby modifies the Conclusions of Law contained in the Decision of the Court at Special Term, as follows:

Conclusion 3: By striking out the words "jus publicum and" in the next to the last line thereof.

Conclusion 5: By striking out the words at the end thereof, "or the exercise of the jus publicum."

Conclusion 21: By adding at the end thereof the words "of 1890."

Conclusion 22: By striking out the period at the end thereof and adding the words "east of the bulkhead line approved by the Secretary of War."

And this Court hereby makes the following additional Conclusions of Law:

26. The Legislature of this State by legislature extinguished the "jus publicum" in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.

27. Chapter 182 of the Laws of 1837 vested in the Mayor Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners of the adjacent upland, subject only to the power of the Federal Government to regulate commerce.

28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.

29. The action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 does not impair or destroy the property and rights of the plaintiff.

30. Said action of the Dock Commissioners with the approval of the Commissioners of the Sinking Fund, does not prohibit the plaintiffs from filling in said premises out to the bulkhead line established by the Secretary of War.

31. The deeds by the City in the years 1853 and 1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation.

32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier.

wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue.

33. The plaintiffs are not entitled to an injunction restraining The City of New York from using or authorizing the use by others of the plaintiffs' premises either within or without the Federal bulkhead line, for the purpose of mooring, docking and floating boats.

Except as thus modified and added to, the Findings and conclusions made by the trial Court, and the refusal of the trial Court to enter as requested by plaintiffs are approved and affirmed.

Enter,

J. P. C.

#### NEW YORK SUPREME COURT, COUNTY OF NEW YORK

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as  
Executors of the Last Will and Testament of Charles E. Appleby,  
Deceased, Plaintiff-Appellants,

against

THE CITY OF NEW YORK, Defendant-Appellant; EBEN E. OLCOTT,  
Central Railroad Company of New Jersey, New York Butchers'  
Dressed Meat Company, New York Horse Manure Transportation  
Company, Burns Brothers, New York Stock Yards Company, De-  
fendant-Respondents, and Weehawken Stock Yard Company, De-  
fendant-Appellant.

#### JUDGMENT OF MODIFICATION

The plaintiffs, and the defendants The City of New York and Weehawken Stock Yards Company, each having appealed to the Appellate Division of the Supreme Court, First Department, from the judgment of the Supreme Court, New York County, herein dated the 13th day of July, 1917, and filed in the office of the Clerk of the County of New York on or about the 25th day of July, 1917, and the defendant Weehawken Stock Yard Company having appealed to said Court from so much of said judgment as orders, adjudges and decrees that The City of New York, its agents, servants, contractors, representatives or assigns or any person or persons whatsoever claiming to have authority from said City be enjoined from excavating, dredging or removing the soil of plaintiffs' premises, and the said appeals having been duly argued at the said Appellate Division and the said Appellate Division having made an order dated the 20th day of January, 1922, and entered and filed in the office of the Clerk of said Court on or about the 3rd day of March, 1922, unanimously modifying the judgment so appealed from by eliminating the provision therein enjoining the excavating, dredging or removing of the soil of so much of plaintiffs' premises as are in the slips westerly of the bulkhead line established by the Secretary of War and as so

modified, affirming without costs in that Court, and it is unanimously

Ordered and Adjudged that the judgment so appealed from herein be modified by eliminating the provisions therein enjoining the excavating, dredging or removing of the soil of so much of plaintiffs' premises as are in the slips westerly of the bulkhead line established by the Secretary of War; and that said judgment as so modified be, and the same hereby is affirmed, without costs in the Appellate Division.

Dated, New York, March 22nd, 1922.

James A. Donegan, Clerk.

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### SUPREME COURT, NEW YORK COUNTY

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as Executors of the Last Will and Testament of Charles E. Appleby, Deceased, Plaintiffs,

against

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD Company of New Jersey, New York Butchers' Dressed Meat Company, New York Horse Manure Transportation Company, Burns Bros., New York Stock Yards Company, and Weehawken Stock Yard Company, Defendants.

### NOTICE OF APPEAL TO COURT OF APPEALS OF DEFENDANT CITY

SIRS:

Please take notice that the defendant The City of New York hereby appeals to the Court of Appeals from the judgment of modification and affirmance herein of the Appellate Division of the Supreme Court in and for the First Judicial Department, entered on March 22, 1922, in so far as the said judgment affirms that portion of the judgment of the Supreme Court, New York County, entered herein in the office of the Clerk of the County of New York on or about the 25th day of July, 1917, which adjudges and decrees that The City of New York, its agents, servants, contractors, representatives or assigns or any person or persons whatsoever claiming to have authority from said City, be enjoined from excavating, dredging or removing soil from so much of plaintiffs' premises as lie easterly of the bulkhead line established by the Secretary of War.

Dated, New York, March 23, 1922.

Yours, etc., John P. O'Brien, Corporation Counsel, Attorney for Defendant the City of New York, Office and Post Office Address Municipal Building, Borough of Manhattan, New York County.

To Banton Moore, Esq., Attorney for Plaintiffs.

To James A. Donegan, Esq., Clerk of the County of New York.



## SUPREME COURT, NEW YORK COUNTY

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as  
Executors of the Last Will and Testament of Charles E. Appleby,  
Deceased, Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD  
Company of New Jersey, New York Butchers' Dressed Meat Com-  
pany, New York Horse Manure Transportation Company, Burns  
Bros., New York Stock Yards Company, Weehawken Stock Yard  
Company, Defendants-Respondents.

## PLAINTIFFS' NOTICE OF APPEAL

SIRS:

Please take notice that the above-named plaintiffs, Edgar S. Appleby and John S. Appleby, individually and as executors under the last Will and Testament of Charles E. Appleby, deceased, hereby appeal to the Court of Appeals of the State of New York, from the order and judgment of modification and affirmance in this action, entered in the office of the Clerk of the Appellate Division, First Judicial Department on March 3, 1922, and entered in the New York County Clerk's office March 22, 1922, modifying the judgment in this action, entered and filed in the office of the Clerk of New York County on the 25th day of July, 1917, by eliminating the provisions thereof enjoining the excavating, dredging or removal of the soil of so much of plaintiffs' premises as are in the slips and basins westerly of the bulkhead line established by the Secretary of War, and affirming said judgment as modified, without costs in said Appellate Division; and the appellants also appeal from each and every part of said order and judgment as well as the whole thereof, except the affirmance of the judgment enjoining the dredging of plaintiffs' premises inside the Federal bulkhead line, and compelling the removal of the overhanging dumping board.

Dated, New York, March 31, 1922.

Yours, &c., Banton Moore, Attorney for Plaintiffs, Office and  
Post Office Address 110 William Street, Borough of Man-  
hattan, City of New York.

To John P. O'Brien, Esq., Corporation Counsel; James A. Donegan, Esq., Clerk of New York County; Stetson, Jennings & Russell, Esqs., Attorneys for Defendant-Respondent Weehawken Stock Yards Company; De Forest Brothers, Esqs., Attorneys for C. R. R. Co. of New Jersey; Farrell & Asch, Esqs., Attorneys for N. Y. Butchers' Dressed Meat Company.

## SUPREME COURT, NEW YORK COUNTY

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as Executors of the Last Will and Testament of Charles E. Appleby, Deceased, Plaintiffs,

against

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD Company of New Jersey, New York Butchers' Dressed Meat Company, New York Horse Manure Transportation Company, Burns Bros., New York Stock Yards Company, and Weehawken Stock Yard Company, Defendants.

NOTICE OF APPEAL OF DEFENDANT WEEHAWKEN STOCK YARD CO.

SIRS:

Please take notice that the above-named defendant, Weehawken Stock Yard Company, hereby appeals to the Court of Appeals of the State of New York, from so much and such part of the order and judgment of modification and affirmance herein of the Appellate Division of the Supreme Court in and for the First Judicial Department, entered on March 22, 1922, as affirms that portion of the judgment of the Supreme Court of New York County, entered herein in the office of the Clerk of the County of New York on or about the 25th day of July, 1917, which adjudges and decrees that the City of New York, its agents, servants, contractors, representatives or assigns or any person or persons whatsoever claiming to have authority from said City, be enjoined from excavating, dredging or removing soil from such of the plaintiffs' premises as lie easterly of the bulkhead line established by the Secretary of War.

Dated, New York, April 14, 1922.

Yours truly, Stetson, Jennings & Russell, Attorneys for Defendant Weehawken Stock Yard Company, Office and Post Office Address 15 Broad Street, Borough of Manhattan, City of New York.

To Banton Moore, Esq., Attorney for Plaintiffs,

To James A. Donegan, Esq., Clerk of the County of New York.

To John P. O'Brien, Esq., Corporation Counsel.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE,  
1921

John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd  
Smith, Alfred R. Page, Edgar S. K. Merrell, J. J.

No. 6583

EDGAR S. APPLEBY and JOHN S. APPLEBY, Individually and as  
Executors of the Last Will and Testament of Charles E. Appleby,  
Deceased, Appellants,

against

THE CITY OF NEW YORK ET AL., Respondents

OPINION OF APPELLATE DIVISION

Cross-appeals by plaintiffs and by defendants the City of New York  
and the Weehawken Stock Yard Company from a judgment of  
the Supreme Court, New York County, entered pursuant to a de-  
cision on a trial of the issues at Special Term.

Spotswood D. Bowers, of Counsel (Banton Moore, attorney) for  
Appellants.

Charles J. Nehrbas, of Counsel (John P. O'Brien, Corporation  
Counsel) for Respondent, The City of New York.

Stetson, Jennings & Russell for Weehawken Stockyard Company,  
Respondent.

LAUGHLIN, J.:

This is a suit in equity for injunctive relief, commenced September 15, 1914, and it is predicated on two grants by the City of land under water, to the ownership of which plaintiffs have succeeded. The first of the grants was made to one Latou on the 24th of December, 1852, in consideration of the payment by him to the City of the sum of \$7,937.50, and of covenants on his part to make the streets, wharves and bulkheads whenever requested to do so by the City, and to keep the streets in good repair and to pay taxes on the premises. The premises were therein described as follows: "All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or harbor of New York and bounded, described and containing as follows:

"That is to say beginning at the point of intersection of the line of original high water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law thence northerly along the westerly line or side of the Thirteenth Avenue two hundred and fifty eight

feet four and a half inches to the line of the centre of Forty-first Street thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction along said line of original high water mark as it runs to the point or place of beginning.

"As particularly described, designated and shown on a map hereto annexed dated New York December 1852 made by John L. Serrell, City Surveyor and to which reference may be had said map being considered a part of this indenture the premises conveyed being colored pink on said map.

"Be the said dimensions more or less Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions of the Twelfth and Thirteenth avenues and Fortieth and Forty-first streets for the uses and purposes of public streets avenues and highways as hereinafter mentioned."

The second grant was made to the father of the plaintiffs on the 1st of August, 1853, in consideration of the payment by him to the City of the sum of \$6,367.37, and like covenants on his part with respect to constructing the streets, wharves and bulkheads and keeping the streets in repair. By a precisely like description, it granted the premises between the original high water mark and the westerly line of 13th Avenue and the center lines of 39th and 40th Streets.

The first point of law to be decided arises on the contention of the plaintiffs that, by these grants, the fee simple absolute passed to the grantees, subject only to an easement reserved to the public for the streets and avenues. It is contended in behalf of the City that the fee to the streets and avenues was excepted from the grants, and it has been so held in a number of cases, in some of which the grants construed were in the precise phraseology of these grants and in others the phraseology was somewhat different (*Whitman v. City of New York*, 85 App. Div., 468; *Consolidated Ice Company v. Mayor*, 166 N. Y., 902; *Langdon v. Mayor*, 93 N. Y., 128, 139; *Mayor v. Law*, 125 N. Y., 380; *Matter of Commissioner of Public Works*, 135 App. Div., 561, *aff'd* 199 N. Y., 531). It must, therefore, be held that the premises within the lines of the streets and avenues were excepted from the grants and remained in the City pursuant to the grants from the State to it under the Dongan Charter of 1686, the Montgomery Charter of 1730, and by Chapter 58 of the Laws of 1826, Chapter 182 of the Laws of 1837, and Chapter 115 of the Laws of 1807, and that the grants from the City passed the fee to the remainder of the premises. It is well settled that these were beneficial grants as distinguished from grants expressly made for the purpose of promoting commerce; and so far as the State and the City were concerned and subject only to control of the United States over navigable waters, the grantees from the City acquired an absolute right to fill in the premises granted between the street and avenue lines, but not to make the streets, avenues, bulkhead and wharves until called upon by the City so to do, or until the City approved plans therefor, and thenceforth any and all rights of the State or the City to claim that any of the waters within the lines of the prem-

ises so granted were navigable were abandoned (*Duryea v. Mayor*, 62 N. Y., 592; *Mayor v. Law*, 125 N. Y. 380; *Whitman v. City of New York*, supra, *Matter of Mayor*, 193 N. Y., 503; *Hastings v. City of New York*, 39 Misc., 728; see also *Consumers' Coal and Ice Co. v. City of New York*, 181 App. Div., 338) *Peo. v. N. Y. & S. I. T. Co.*, (68 N. Y. 71), *Matter of Public Service Commission*, (*Montague St.*, 224 N. Y., 211), *New York Dock Co. v. Flynn, O'Rourke Co.* (App. Div., 2nd Dept. Nov. 7, 1921) *Matter of McClelland* (146 App. Div. 594, aff'd on opinion of App. Div., 204 N. Y. 677), in so far as they appear to be in conflict with the views I have stated, are distinguishable on the ground that the grants there under consideration were expressly made to promote commerce, and therefore, were not intended as an abandonment of the navigability of the water. In *Knickerbocker Ice Co. v. 42nd St. R. R.* (176 N. Y. 408) and *Matter of Long Sault Co.* (212 N. Y. 8) and *People v. D. & H. Co.* (213 N. Y. 194) there are expressions to the effect that the State holds such property on a public trust, and that its grantees do not take an unqualified fee; but those decisions are not inconsistent. I think, with the right of the State to grant a fee for a valuable consideration to a riparian owner of land under water at the edge of a navigable stream not deemed necessary for navigation. The high water line in this locality passed between 11th and 12th Avenues, nearer 11th than 12th. The first bulkhead line was established in the vicinity by Chapter 763 of the Laws of 1857, 100 feet westerly of the westerly side of 12th Avenue, by the confirmation of the Harbor Commissioner's map so showing it. That map shows 41st Street as ending at 12th Avenue, and an existing bulkhead a little to the east of the easterly line of 12th Avenue, and a pier extending from 40th Street westerly across 12th Avenue and another extending from 39th Street westerly beyond the bulkhead line thereby established. It does not appear when these piers were built or by whom, other than may be inferred from a resolution adopted by the Board of Aldermen on the 3rd of June, 1850, granting certain water rights to one Cobb on condition that he build a pier at the foot of West 39th Street under the Street Commissioner's direction within one year, and another resolution directing the Street Commissioner to build a pier 100 feet in length at the foot of West 40th Street, to be used in the removal of offal. If I am correct in views already expressed, said Act of 1857, establishing a bulkhead line inside the exterior line of 13th Avenue, could not become effective as against said grants without compensation to the owners thereof.

Plaintiffs alleged, and the City admitted, that neither the "plaintiffs nor their testator, and predecessor in title, Charles E. Appleby, have ever been required to build or erect said street, wharves or bulkheads forming part or portions or whole of Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets." There is a like allegation and admission with respect to the other grant. The grants obligated the grantees at their own cost and expenses to make the streets and avenues and bulkheads, and thereafter to keep and maintain them in repair when required so to do by the City; but it would

seem from these allegations and admissions that they were never required to make any of the streets, avenues, or bulkheads, and there is no evidence that they did. It is to be inferred from the Harbor Commissioner's Map, which was confirmed by the act of 1857, that the streets in question had been made in the easterly line of 12th Avenue, and that the premises granted between 39th and 40th Streets, and 40th and 41st Streets had been filled in from the line of high water to the easterly line of 12th Avenue, but it does not appear by whom that was done. The bulkhead or wharf was so shown to have been constructed along the easterly line of 12th Avenue prior to 1857. There is no evidence other than may be inferred from some photographs and maps showing coal bins on the wharf and photographs showing coal barges in the slips, that any use has been made by the plaintiffs of these bulkheads; but they are not the bulkheads referred to in the grants, which were to be on the exterior line of 13th Avenue. By Chapter 137 of the Laws of 1870, as amended by Chapter 576 of the Laws of 1871, the Department of Docks was created, and the Board of Commissioners of Docks was directed to cause a plan for the development of the water front of the City to be prepared, and was authorized to purchase or obtain by condemnation wharf property. They adopted a proposed plan for a new bulkhead line westerly of the easterly line of 12th Avenue, which should be 50 feet west of the bulkhead line of 1857, and a pierhead line 500 feet westerly of the bulkhead line, and indicated thereon where piers might be built. That plan was accepted by the Sinking Fund Commissioners pursuant to the provision of said statutes, and thereby became effective. That plan provided for piers 80 feet wide extending westerly from the foot of each street in question to the pierhead line. It was duly amended in 1884, reducing the width of the piers to the width of the streets. The Secretary of War approved that bulkhead line in 1890, and in 1897 he approved a pierhead line 700 feet westerly of the bulkhead line. In 1887, the pier at the foot of 40th Street was extended by the construction of a wooden pier extending 500 feet beyond the bulkhead line, and that was extended 200 feet further in 1912 to the new pierhead line. The pier at the foot of West 39th Street was removed in 1896 and a new pier was constructed from the foot of West 39th Street to the new pierhead line 700 feet beyond the bulkhead. The first and only pier at the foot of West 41st Street was built in 1904 from said unofficial bulkhead line at the easterly line of 12th Avenue to said pierhead line established by the Secretary of War. All of these piers are within the lines of the streets continued, and of the precise width of the streets, and they were constructed by the City without the consent of the plaintiffs or their predecessors in title, and against their protest. The record shows that, commencing with the year 1900, the City leased parts of those piers and has received rentals therefor and has permitted the tenants to erect sheds and platforms thereon. It appears that one of these was a dressed meat company, another a stock yard company, another a railroad, another a coal company, and another a manure transportation company. It was stipulated that in 1884, prior to any dredging by the City, the

depth of the water at the bulkhead, as constructed along the easterly line of 12th Avenue, was three or four feet, and that by dredging the City, prior to 1916, increased the average depth of the water to twenty feet in to a line 50 feet west of the westerly line of 12th Avenue. It was conceded that, in connection with the business of the City's tenants on the piers, vessels came alongside the piers and were moored thereto, and that the City has not accounted to the plaintiffs for any of the rents so received. The City, by the adoption of a resolution by the Department of Docks June 11, 1891, instituted a proceeding to acquire title and possession from the plaintiffs of the premises between the streets and avenues granted to the plaintiff's predecessor in title, but there was no resolution vesting title thereto in the City. Two of the commissioners died. The City only was authorized to apply to fill the vacancies, and it having failed so to do, plaintiffs on July 30th, 1914, moved for a mandamus to compel the City so to apply. The hearing of the motion was postponed, and thereupon a resolution was adopted discontinuing the proceeding, and the motion was withdrawn without prejudice. Plaintiffs, evidently on the theory that it is inequitable to tax them for the premises and not give them the full use thereof, showed that in 1912 the City brought two actions for the foreclosure of tax liens on these respective parcels bounded by the streets and avenues, and that they were compelled to pay a large amount of taxes after the validity thereof was sustained by the Court of Appeals.

After the trial of the issues herein, but before the decision thereof, the Commissioner of Docks proposed a plan amending the plan for water front improvements between West 38th and 42nd Streets by moving the bulkhead line inshore 100 feet, which places it 50 feet west of the westerly line of 12th Avenue, and this amendatory plan was approved by the Sinking Fund Commissioners on the 14th of June, 1916. On the 13th of July, 1917, the judgment was entered herein pursuant to the decision, enjoining the City from further excavating, dredging, or removing the soil of the plaintiffs' premises between the piers, and requiring it to take down and remove an overhanging dumping-board or platform erected on the northerly side of the pier in West 39th Street, and awarding costs of the action to the plaintiffs. Plaintiffs' demands for judgment, which were not granted, were that the defendants be enjoined and restrained from mooring, docking, and floating boats over their said premises, and from exercising, claiming or asserting any easement, right, title, or interest in, over, or upon said premises for floating, mooring, or docking boats, and from interfering in any manner with the use and enjoyment of said premises by the plaintiff, their lessees and assigns, or in any manner using said premises, slips or basins, and that the City be required to take down and remove all pierheads, fences, and structures in said street between 12th and 13th Avenues, which interfere with the free and unrestricted use of the street as a public highway, or which impair the right of the plaintiffs to fill in and make said streets when permitted or required, or which interfere with their easements of light and air and access in said streets, and prevent them from filling in their premises between said streets.

On conflicting evidence with respect to whether plaintiffs were damaged by the dredging done by the City, the Court found that they only sustained nominal damages, but the judgment contains no reference thereto.

On an appeal by the plaintiffs from an order denying their motion for a temporary injunction, this Court held that the right of the plaintiffs to fill in the navigable water of the Hudson River was limited by the bulkhead line of 1871 (*Appleby et al. v. City of New York, et al.*, 167 App. Div. 339). We did not then have before us the point as to whether it was competent for the municipal authorities to change the bulkhead line by moving it farther inshore as they did in 1916. Appellants contend that their rights remain unaffected by that change in the bulkhead line, and that they are at liberty to construct a wharf on the bulkhead line of 1871 and to fill in their land behind it. Counsel for the City concedes that, if they had so constructed bulkheads any wharves and filled in their land, their rights could not thereafter be affected by a change in the bulkhead line without just compensation, but it is contended in behalf of the City that, when the appellants come to exercise those rights, they must conform to any change lawfully made in the bulkhead line. The learned counsel for the City contends that the grants were made subject to the establishment of bulkhead and pierhead lines, as might be necessary in the development of harbor improvements and in the interests of commerce, and that the Commissioner of Docks was authorized, with the approval of the Sinking Fund Commissioners, to amend the plan for harbor improvement by thus changing the bulkhead line, so long as the right to fill to the old bulkhead line had not been exercised, and the water remained navigable, and cites authorities in support of that claim (see *People v. N. Y. & S. I. F. Co.*, *supra*; *Consumers' Coal & Ice Co. v. City of New York*, *supra*; *American Ice Co. v. City of New York*, 217 N. Y., 402; *West Chicago R. R. v. City of Chicago*, 201 U. S., 503; *Matter of Public Service Commission (Montague St.)* *supra*; *Sage v. Mayor*, 154 N. Y., 61; *White v. Nassau Trust Co.*, 168 N. Y., 149, 157). In *Matter of Public Service Commission*, *supra*, where the City condemned the fee to land under water between piers, it was held that the pier owners were not entitled to compensation for the reason that the City would take the fee subject to the right of navigation existing in the State, and that therefore no rights of the pier owners with respect to the use of their piers would be affected, but there and in *New York Dock Co. v. Flynn, O'Rourke Co.*, *supra*, and in *Matter of McClelland*, (146 App. Div., 394, *aff'd* 204 N. Y., 677), as has been seen the grants were not the same as those now before the Court. In none of the cases cited was this point decided. Some of the opinions seem to imply that until the grantee exercises his rights, they are subject to public regulation, but it has not been so held as intimated, where, as here, the City has conveyed a fee for a substantial consideration.

The approval of the Secretary of War of the bulkhead line of 1871 precluded the State or any agency of the State from establishing a bulkhead line further out, and required that the water



outside that line should be open to navigation and free from any obstruction save piers with open slips between for warning vessels and handling commerce, but did not preclude the State or City from setting the bulkhead line further inshore, which would enlarge the navigable water (*Montgomery v. Portland*, 190 U. S., 89; *Cummings v. City of Chicago*, 188 U. S., 410).

Appellants further contend that they have a right to erect piers from the bulkhead over their land to the pierhead line between the piers on the lines of the streets; but that contention is plainly unsound, for Chapter 763 of the Laws of 1857, Section 99, Sub. 3 of Chapter 137 of the Laws of 1870 as amended, Chapter 576 of the Laws of 1871 and Section 819 of the Greater New York Charter, forbid any construction in navigable water beyond the bulkhead line, excepting piers authorized under the statute or the plan adopted under the statute, and the Federal authorities merely located the bulkhead and pierhead lines, and left it to the State to regulate the dimensions and location of piers (*People v. N. Y. & S. I. Ferry Co.*, supra; *Consumers' Coal and Ice Co. v. City of New York*, supra; *Matter of Public Service Comm.*, supra, at p. 216).

The grants, however, gave the grantees the right to construct bulkheads on the water front of the lands granted, and to collect wharfage and cramage in perpetuity, and of those rights they cannot be deprived without compensation, and therefore they have the right to erect a bulkhead and wharf on the new bulkhead line so established by the Secretary of War, since that is the furthest west that such bulkhead may lawfully be constructed, and to exercise their rights with respect thereto (*Langdon v. Mayor*, supra; *Williams v. Mayor*, 165 N. Y., 419; *Matter of Commissioner of Public Works*, 135 App. Div., 561, aff'd, 199 N. Y., 531). The grants expressly reserved to the City the right to wharfage and cramage at the ends of the streets. Since, however, the fee to the streets was reserved to the City, and it owned the fee under water to the westerly thereof, it was under no obligation to the grantee to construct bulkheads or wharves at the foot of the streets, and was within its rights in erecting the piers on its own property and in erecting shed and other structures thereon (Sees. 821, 821a, and 844, Greater New York Charter; *Williams v. Mayor*, supra; *Sage v. Mayor*, 154 N. Y., 61). Plaintiffs, with respect to their land, may have a right of lateral access to and from the streets, which will give them a right of access inside the bulkhead line to and from what are now piers, when the bulkhead is constructed, on the theory that what are now piers will then become to that point streets; but they have no easement or right of access in connection with their lands to or from the ends of the streets as they existed when the grants were made, or to and from the ends or sides of the piers as now constructed beyond the bulkhead line. When the plaintiffs construct a bulkhead and wharf on the authorized bulkhead line, and fill in their land behind it, the City will doubtless remove the obstruction on the surface of what are now piers inside the bulkhead line; and if it should not, plaintiffs may have a remedy by mandamus to compel

the removal thereof. A mandatory injunction therefor now has not been shown to be necessary.

The projections from the side of the pier over the plaintiffs' lands, which the City has been required to remove, are outside the lawful bulkhead line approved by the Secretary of War, and it has not been shown that they interfered with any use the plaintiffs now desire to make of their bulkhead rights, but they constitute a technical trespass and might ripen into a prescriptive right, and if in the future they should interfere with the plaintiffs' wharfage and cramage rights, a prescriptive right to maintain them might be asserted by the City. Therefore, I think the trial court was right in requiring their removal.

I am also of opinion that the Court correctly decided that the plaintiffs were not entitled to a mandatory injunction requiring the City to remove the sheds and other structures erected on the pier. So far as plaintiffs are concerned, the City, I think, has the right to build and shed the piers in any manner it sees fit on its own land beyond the bulkhead line and within the pierhead line (Greater New York Charter, Sec. 821, 821a, and 841; *Williams v. Mayor &c., of New York*, 105 N. Y. 419).

I think, however, that the City should not be enjoined from dredging the slips between the piers to the new bulkhead line, so approved by the Secretary of War. Since plaintiffs have no right permanently to obstruct the navigable waters in the slips beyond the bulkhead line, they cannot be damaged or prejudiced by the City's dredging and removing earth therefrom in order to deepen the water for the purposes of navigation. It has not been shown that such dredging in any manner interferes with any use the plaintiffs desire to make of their bulkhead, wharfage, and cramage rights. If, therefore, such dredging technically constituted a trespass, there is no propriety in granting an injunction to restrain it, and the plaintiffs should be left to enforce their rights, if any, at law. I am of opinion, however, that it does not constitute a trespass. It is well settled that the Federal Government has a right to dredge navigable waters, and that the owner of the fee to the land under such waters holds his title subject to the exercise of such right, and it was so held where such dredging destroyed valuable oyster beds lawfully planted by the owner of the fee (*Lewis Blue Point Oyster Co. v. Briggs*, 198 N. Y. 287, *aff'd* 229 U. S. 82). The State, subject to Federal laws, has authority to regulate navigable waters within its jurisdiction in the interests of commerce, and to maintain them as efficient highways, and to remove obstructions therefrom, and to dredge the same where necessary (*Matter of Public Service Comm., supra*; *Matter of McClelland, supra*, at 598), and the Legislature by Section 832 of the Greater New York Charter has delegated its authority in this regard, so far as the land under public waters in slips is concerned, to the Commissioner of Docks. I am, therefore, of opinion that the Commissioner has a lawful right to dredge or cause to be dredged these slips between the piers to the bulkhead line.

It has been held in some cases that an owner of upland who owns the land under the water in front of his upland, and who constructs

a pier over the land under the water, obtains no right, as against the owner of the land under water adjacent to the pier, to use, those waters for the purposes of mooring vessels at the sides of the pier (Consumers' Coal and Ice Co. v. City of New York, *supra*; Jenks v. Miller, 14 App. Div., 474; Union Ferry Co. v. Fairchild, 181 App. Div., 639). Where, as here, the owner of the piers enjoys a monopoly in the sense that no other pier and no obstruction may be placed beyond the bulkhead line between the piers or adjacent, thereto, the rule, I think, is different, and the owner of the piers, in common with the owner of the bulkhead at the inner ends thereof, has a right to the reasonable use of the navigable waters between the piers or adjacent thereto for all purposes of navigation, including the right to moor vessels alongside the piers; but the exercise of their respective rights is subject to regulation by the Dock Masters (Section 867 of the Greater New York Charter; Matter of McClelland, *supra*; Matter of Public Service Commission, *supra*; see also Consumers' Coal and Ice Co. v. City of New York, *supra*).

The plaintiffs failed to show by satisfactory evidence any substantial damages from the invasion of their rights by dredging easterly of the bulkhead line established by the Secretary of War or the use by the City of the water over their lands easterly of said line.

It follows that the judgment should be modified by eliminating the provisions thereof enjoining the dredging of the slips westerly of the bulkhead line established by the Secretary of War, and as so modified, affirmed without costs. All concur.

#### STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order and judgment appealed from, the opinions of the Court and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Sections 577, 616 and 170, 1553 of the Civil Practice Act is hereby waived.

Dated, New York, June 12, 1922.

John P. O'Brien, Corporation Counsel, Attorney for Defendant-Appellant, the City of New York.   Banton Moore, Attorney for Plaintiffs-Appellants.   Stetson, Jennings and Russell, Attorneys for Defendant-Appellants Weehawken Stock Yards Co.

Compared & Correct. Undertaking given. J. M. J. S. C.

## CLERK'S CERTIFICATE

STATE OF NEW YORK,  
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for  
the County of New York

I, James A. Donegan, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 24 day of August, 1923, and in obedience thereto, do hereby certify that the foregoing pages numbers from 1 to 1789 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the — Edgar S. Appleby & Ano. vs. The City of New York et al. mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, Bond on Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 30 day of August, 1923.

— — —, Clerk. (New York Seal.)

## REPORTER'S CERTIFICATE

STATE OF NEW YORK, ss:

## COURT OF APPEALS

## State Reporter's Office

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Edgar S. Appleby et al., Individually and as Executors of Charles E. Appleby, Deceased, Appellants and Respondents, v. The City of New York et al., Respondents and Appellants, decided by the Court of Appeals on the 17th day of April, 1923, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this sixth day of September, 1923.

J. Newton Fiero, As Reporter of the Court of Appeals of the State of New York. Attest: R. M. Barber, Clerk of the Court of Appeals. [Seal Court of Appeals, State of New York.]

## CHIEF JUSTICE'S CERTIFICATE

STATE OF NEW YORK:

## COURT OF APPEALS

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and report thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Edgar S. Appleby et al., Individually and as Executors of Charles E. Appleby, Deceased, Appellants and Respondents, v. The City of New York et al., Respondents and Appellants, decided by the said Court of Appeals on the 17th day of April, 1923, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said court appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York, on the 12th day of September in the year one thousand nine hundred and twenty-three.

Frank H. Hiscock, As Chief Judge of the Court of Appeals  
of the State of New York.

## IN THE COURT OF APPEALS

[Title omitted]

(Decided April 17, 1923)

Cross-Appeals from Judgment of the Appellate Division, First Department, Modifying and as Modified Affirming a Judgment of Special Term in Favor of Plaintiffs.

## OPINION

Spotswood D. Bowers and Banton Moore for plaintiffs, appellants and respondents.

John P. O'Brien, Corporation Counsel (Charles H. Nehrbas of counsel), for defendant, respondent and appellant, the City of New York.

Stetson, Jennings & Russel for Weehawken Stock Yard Company, intervener.

POUND, J.:

This is an action to restrain the city of New York and other defendants from interfering in any way with the use and enjoyment of plaintiffs' land under the water of the Hudson river between Thirty-ninth and Fortieth streets and between Fortieth and Forty-second streets, outshore of Twelfth avenue in the borough of Manhattan.

Title to the premises was vested in the City of New York by grants under the Colonial Charter of Governor Dongan in 1686. By chapter 115, Laws of 1807, the commissioners of the land office were directed to issue letters patent to the city granting to it all the right and title of the state to the lands under the water at the locality, extending from low-water mark, four hundred feet into the river. By chapter 182, Laws of 1837, Thirteenth avenue as laid out on the George B. Smith map, so called, was declared to be the permanent exterior street or avenue in the city along the easterly shore of the Hudson river between the southerly line of Hammond street and the northerly line of One Hundred and Thirty-fifth street. The city of New York was vested with all the right and title of the people of the state to the lands under water extending from the westerly line of the lands granted by the act of 1826 to the westerly line of Thirteenth avenue, so laid out. The street lines were laid out over the lands under water thus conveyed. Chapter 225, Laws of 1845, authorized the adoption of the ordinance known as the sinking fund ordinance which empowered the city to make the grants herein-after mentioned.

On or about December 24, 1852, the city issued to one Laton a grant of a portion of the lands in suit, describing the same as a "water lot or vacant ground and soil under water to be made land and gained out of the Hudson." Another like grant was issued to the predecessor of plaintiffs on or about August 1, 1853, of the remaining portion of the lands. Plaintiffs claim title under these grants. The westerly line is the westerly line of Thirteenth avenue. The easterly line is the line of original high-water mark, which runs between Eleventh and Twelfth avenues. The grants were made for a substantial consideration. The streets were reserved to the city out of the granted premises and the grantees agreed to build streets and wharves when directed by the city. No such direction has been given.

By Chapter 121 Laws of 1855, a commission was appointed to prepare plans for the improvement of New York harbor. By chapter 763, Laws of 1857, bulkhead and pier lines were established for the port of New York. A bulkhead line or line beyond which solid filling should not extend was established about 100 feet west of the westerly line of Twelfth avenue. This line was some distance east

Thirteenth avenue as laid out on the map. Under chapter 574, laws of 1871, a further plan for the improvement of the water front moved the bulkhead line fifty feet farther out into the river and laid out piers eighty feet in width at the foot of Thirty-ninth, Fortieth and Forty-first streets.

In 1890 the latter line was established as a bulkhead line by the secretary of war under authority vested in him by Congress. Piers have been laid out under an authorized plan and built by the city within the street lines of Thirty-ninth, Fortieth and Forty-first streets, which extend into the river beyond the bulkhead line. Permits and leases to occupy and use the piers have been granted by the city to the other defendants herein who float vessels in the slips over the plaintiffs' lands. The city of New York claims the right to dredge such lands for the purposes of harbor improvement. They rest such right on the contention that the lands under water are navigable and cannot lawfully be obstructed by plaintiffs. The plaintiffs contend that the land under water between the bulkhead line and their westerly line was granted in fee simple absolute and for beneficial enjoyment; that no public right of navigation remained over the lands thus conveyed.

The question is to what extent has the state by its grants extinguished the *jus publicum* over such lands.

At Special Term the City of New York was enjoined from dredging the lands of plaintiffs. The Appellate Division modified this judgment by permitting the city to dredge the lands west of the bulkhead line established by the secretary of war.

The city appeals because it claims the right to dredge any portion of plaintiffs' land between the piers. The plaintiffs appeal on the ground that they are entitled to the relief demanded in the complaint.

The state holds the title in fee to lands under water as sovereign for the public, subject to the right of the people to use the river as a water highway. The grant of the lands to the city in 1807 was for the purpose of enabling the city to regulate and construct slips, wharves and piers. The city sold the lands for the purpose of enabling the grantees to fill and use the land for the extension of streets thereon and the erection of wharves, piers, etc.

The grant was, therefore, not absolute and unqualified, but was subject to the rights of the public. (*American Ice Co. v. City of New York*, 217 N. Y. 402, 405, 406.) The city could not exclude the public from the use of navigable waters and it could not grant the right to exclude the public from such use so long as the waters remained navigable. It scarcely needs assertion that it could not destroy the navigability of the Hudson by making exclusive private grants. It could convey submerged lands along the shore to promote commerce, not to destroy it.

When the secretary of war established the bulkhead line, the title of the state, the city and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such

line. The owner's title was subject to the use which the United States might make of it. (*Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82.) Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The city of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs.

But the United States acts as sovereign and the state of New York acts also as proprietor. The authority of the state in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery v. Portland*, 190 U. S. 89; *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips.

If plaintiffs' lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the state (*First Construction Co. v. State*, 221 N. Y. 295), but so long as they remained under water they were subject to the sovereign power of the state to regulate their use for purposes of navigation. The state has delegated such power to the city. The city may not, however, as the successor to the title of the state, convey lands under waters to private owners and retake the same by the exercise of the police power without making compensation therefor. (*Penn. Coal Co. v. Mahon*, 260 U. S. 393, 43 Sup. Ct. Rep. 158.) A distinction is taken between the mere ownership of the soil under water and the control over it for public purposes. (*People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71.)

Great cities have been built up by grants of land under water. The city of New York has been similarly developed by extending it over submerged lands. The promotion of the commercial prosperity of the port has been one purpose of such grants. But no case holds that any substantial interference with navigation may thus be authorized. Much that has been said in the cases as to the absolute and uncontrolled power of the state to grant the navigable waters for private purposes as it may grant the dry land it owns is dictum (*People v. Steeplechase Park Co.*, 218 N. Y. 459; *Langdon v. Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown resides in the people in their sovereign capacity and cannot be conveyed for private purposes. (*Town of Brookhaven v. Smith*, 188 N. Y. 74; *Barnes v. Midland R. R. Terminal Co.*, 193 N. Y. 378.) The lands in question remain under the public waters of the state and so long as they remain such, the right to control navigation over them remains in the state to be exercised in the public interest. (*Matter of Long Sault Development Co.*, 212 N. Y. 1; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 453.) The



state has succeeded to the *jus publicum* of the English crown and not to the *jus privatum* (*Town of Brookhaven v. Smith*, *supra*), notwithstanding much unnecessary discussion of the latter doctrine. The *jus privatum* in any event is at all times subject to the *jus publicum*. (*Tiffany v. Town of Oyster Bay*, 234 N. Y. 15.) The right of the grantee to fill in his land under water with solid filling (*Duryea v. Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. But such grant having once been made, titles traced back to the state as proprietor may not be divested by such regulations, without compensation.

The grant to plaintiffs being a property right which can be resumed by the city only on payment of compensation, was a grant of all the title the city had to convey. The right of the public was not thereby extinguished. The city had the right to dredge out all the lands under water between the bulkhead line does not conflict with the right of the city in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the city to convey to private owners.

The judgment should be affirmed, without costs.

Hiscock, Ch. J., Hogan, Cardozo, McLaughlin, Crane and Andrews, JJ., concur.

Judgment affirmed, etc.

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## IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

### PETITION FOR WRIT OF ERROR

To Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

And now come Edgar S. Appleby and John S. Appleby, individually and as Executors of Charles E. Appleby, deceased, and respectfully represent:

That a motion for rehearing of this cause was entertained and denied by the Court of Appeals of the State of New York, which is the highest court of said State, on June 4, 1923, and of the final judgment herein, dated April 17, 1923 affirming the judgment of the Appellate Division of the Supreme Court, in and for the First Judicial Department, without costs, which latter judgment modified and affirmed a judgment of the Special Term for Trials of the Supreme Court, New York County, all entered in a suit in equity, wherein the petitioners are plaintiffs and The City of New York and others above named, were defendants.

The decision is erroneous and partly against a Federal act and authority and in favor of State statutes and authority and deprives petitioners of their property, and rights by contract, in violation of the Constitution of the United States.

It is far-reaching and of national, as well as local and individual, importance.

Petitioners are the owners of two "certain water lot(s) or vacant ground and soil under water to be made land and gained out of the Hudson or North River" etc., between Twelfth and Thirteenth Avenues, and between West 39th Street and West 40th Street, and West 40th Street and West 41st Street, in the Borough of Manhattan, New York City, by virtue of two certain deeds from the said City (Plaintiffs' Ex. 4 & 5).

Said City was "vested with all the right and title of the people of this State" to this and other land under water, easterly of Thirteenth Avenue, by Chap. 182 of the Laws of 1837, Sec. 3, and pursuant to Sec. 4 of said Act made said deeds for value.

The petitioners brought this suit against The City of New York and other defendants, who are lessees of the City, claiming that their property and rights were trespassed upon by the City in converting same into private slips and basins according to a certain City plan, the excavation and dredging thereof, and leasing same at great revenue for boats, floats and watercraft.

The City and the respondent, Weehawken Stock Yard Company answered, admitting the material facts, but denying the trespass, upon the theory that the acts complained of invaded no property or rights of the petitioners.

The Court decided in favor of the City, except as to the dredging, against which it issued an injunction which was limited on appeal to that portion of the property inside the Federal bulkhead line.

Petitioner, duly raised at the trial the text of the Federal and State statutes, and requested the Court to find that if said statutes are construed as the City contends, that they violate the Constitution of the United States (fols. 439-448) as hereinafter set forth.

The Court held that "When the Secretary of War established the bulkhead line" (pursuant to the River and Harbor Act of 1890, 26 Stat. 455, amended 1899, 30 Stat. 1151-1155) "the submerged lands" of the petitioners were "subordinated" "to the public right of navigation." (235 N. Y. 351, 361, and Judgment fol. 1654 of Record.) This is not correct.

Section 10 of the River and Harbor Act says:

"That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, \* \* \*

and Section 11 says:

"That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him;  
\* \* \*

In both sections the word lines is plural.

The Secretary of War established two lines. The bulkhead line, across the premises in question, and the pierhead line far beyond the premises.

On the Secretary of War map (Extract, Defendants' Ex. C, at page 529) are the words:

"The bulkhead line defines the limit for solid filling; the *pierhead* line, the limit to which *open piled structures may be built.*" (Italics ours.)

We are informed that the legend appears upon all such maps of the War Department.

It thus clearly appears that the Court denied the full effect of the Statute and the authority of the pierhead line, established by the Secretary of War, to the injury of petitioners.

The ruling is contrary to the text of the Statute, which distinctly indicates two classes of rights: a "bulkhead" for making "deposits" and pierhead for building piers, wharves, etc.

It is also contrary to the legend on the Secretary of War map, aforesaid, which, instead of "subordinating" the submerged lands "to the public right of navigation" specifically says that "open piled structures may be built" thereon.

The said ruling is even contrary to the admitted facts of the case. The public does not and cannot use the slips and basins on petitioners' property. The only users are the defendants herein, or their successors, who pay the City large rental therefor. (Plaintiffs' Ex. 47-80.)

The Federal Act and authority confirm the rights of petitioners, as successors of "all the right and title" of the State and City, and does not subordinate or destroy same.

There is further error as to the State statutes and authority exercised thereunder.

Respondents allege that petitioners' rights were "prohibited" and impaired by Chap. 763 of the Laws of 1857 and Chap. 574 of the Laws of 1871. (Fols. 226-234.)

This legislation was subsequent to Chap. 182 of the Laws of 1837, and the deeds in 1852 for value.

But the Court, disregarding the Federal pierhead line, held that all property was subordinated by the Federal bulkhead line in 1890, and thereupon the said State statutes of 1857 and 1871 then became effective to prevent use by petitioners.

The Federal bulkhead line did not have this effect or intent. It did not validate unconstitutional State legislation or give State statutes a meaning never intended, as hereinafter shown.

It is admitted that the petitioners own a space of about 200 feet between each street, and that the City owns 60 feet in the bed of each street. The petitioners' title is dominant and that of the City servient, by the contract in the deed and settled law, yet the Court strangely holds that the petitioners cannot build a pier or wharf on their land while the City can do so on the street, and that the petitioners' property must remain water for the benefit of the wrongdoer.

That, as appears in the record and proceedings, there was drawn in question:

1. The validity and effect of a Federal Statute, to wit, the River and Harbor Act of 1890 (26 Stat. 455, amended 1899, 30 Stat. 1151-1155), and the authority of the Secretary of War exercised thereunder, on the ground that the interpretation thereof by the State Court is contrary to the intent thereof and erroneous and repugnant to the Constitution of the United States.

The Court decided that "When the Secretary of War established the bulkhead line" across petitioners' property, "the title of the state, the city and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation," (235 N. Y. 351, 361) although the Federal government established a pierhead line further west of and beyond plaintiffs' property, and

"That as the Federal government did not attempt to provide regulations as to building piers, wharves and docks within said space" between the bulkhead and pierhead lines, "that the State government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chap. 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chap. 574 of the Laws of 1871, as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and Thirteenth Avenue." (Fols. 1654-1656.)

That the plaintiffs duly requested the Court to decide at the trial that if the Federal statute and action of the Secretary of War be construed as depriving plaintiffs, or their predecessors in title of their property and rights, without compensation, they are invalid, as violating the Fifth Amendment of the Constitution of the United States in taking their property without due process of law or for public use

without just compensation (fols. 449, 450), which the said Court refused to do (fol. 438), and to which plaintiffs excepted (fol. 622).

2. The validity and effect of the respective State statutes and authority exercised under the same by the City authorities on the ground of their being repugnant to the Constitution of the United States and the Constitution and Laws of the State of New York. And the plaintiffs requested the Trial Court to decide that if said State statutes or the authority exercised under same be construed as depriving plaintiffs or their predecessors in title of their property and rights without compensation that they were invalid as violating certain provisions of the Constitution of the United States and of the State of New York (fols. 438-448), which the Court refused to do (fol. 438), and to which plaintiffs duly excepted (fol. 622).

3. The title, right, privilege and immunity claimed under the Constitution and Statute of the United States, and the authority exercised by the Secretary of War. That the plaintiffs and their predecessors in title paid large sums of money for the purchase of the property herein involved, and complying with the covenants of the deed and the payment of taxes upon said property, which is under the protection of the Constitution and Laws of the United States and of the State of New York, and has been taken from them without compensation, even their right to erect open piled structures west of the Federal bulkhead line which is specifically authorized by the Secretary of War. That the petitioners relied upon the equal protection of the law and their constitutional rights and believed that the law was settled as a rule of property in this State, and could not be changed so as to deprive them of their property and rights without compensation.

And your petitioners aver that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioners, all of which fully appears in the records and proceedings of the case and are more specifically set forth in the assignment of errors filed herewith.

Wherefore, your petitioners pray that a Writ of Error from the Supreme Court of the United States may issue in this case to the Court of Appeals of the State of New York, for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court, New York County, may be sent to the Supreme Court of the United States as provided by law.

Dated, New York, August 15, 1923.

Edgar S. Appleby and John S. Appleby, Individually, etc.,  
Plaintiffs in Error & Petitioners. Banton Moore, Attorney  
for Petitioners and Plaintiffs in Error.

## IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

## ASSIGNMENT OF ERRORS

Now come Edgar S. Appleby and John S. Appleby, individually and as Executors, etc. aforesaid, petitioners and plaintiffs in error, by Banton Moore, their attorney, and in connection with their petition for a Writ of Error show that, in the record and proceedings and in the rendering of the judgment and decision of the Court of Appeals in the above entitled cause, manifest error has intervened to the prejudice of petitioners and plaintiffs in error in this, to-wit:

First. The Court erred in holding that "When the Secretary of War established the bulkhead line" pursuant to the River and Harbor Act of 1890, (26 Stat. 455, amended 1899, 30 Stat. 1151-1155), across certain premises owned by the petitioners in the Borough of Manhattan, New York City, "The title of the State, The City and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation" (235 N. Y. 351, at p. 351) and that they could not build any pier, wharf or other structure whatsoever thereon (fols. 1654-1655 of Judgment) although said property is far within the Federal pierhead line, and said act and authority and pierhead line expressly permitted such structures to be built. The decision is, therefore, against the validity of the said United States Statute and particularly Secs. 10 & 11 thereof, and against the authority of the Secretary of War in establishing the pierhead line aforesaid. That petitioners duly requested the Trial Court to decide that, (fol. 449).

"30. The Federal Statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises does not deprive plaintiffs of their title and rights in respect to said granted premises, excepting insofar as the right to make solid filling west of the said bulkhead line of 1890, is or may be dependent upon the consent of the Secretary of War thereto."

"31. If the Federal statute and the action of the Secretary of War be construed as depriving plaintiffs or their predecessors in title of their property and rights, without compensation, they are invalid, as violating the Fifth Amendment of the Constitution of the United States in taking their property without due process of law or for public use without just compensation."

(fols. 449, 450), which the Court refused to do (fol. 438) and to which petitioners duly excepted (fols. 621-622).

Second. The Court erred in holding that after the Federal Acts and authority aforesaid

"the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no

piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

(fols. 1654-1656), and also erred in refusing to hold as requested by petitioners at the trial that

[fol. 594] "28. Chapter 763 of the Laws of 1857 does not operate on the deeds to the plaintiffs' predecessors in title and does not deprive them of any of their rights and title under said deeds."

"29. If Chapter 763 of the Laws of 1857 should be construed as affecting the deeds to plaintiffs' predecessors in title and limiting their rights to fill in the premises granted under said deeds, such act would be invalid as violating, first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1 of Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law."

(fols. 447-448), and

"22. If Chapter 574 of the Laws of 1871, as supplemented and amended, be construed as authorizing the Board of Docks with the consent of the Commissioners of the Sinking Fund of the City of New York, to change the bulkhead line established by Chapter 182 of the Laws of 1837 and to prohibit, without compensation, solid filling by the plaintiffs or their predecessors in title of the granted premises out to Thirteenth Avenue, then it is invalid, as violating; first, Article 1, Section 10, part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law and taking their property for public use without just compensation."

(fol. 438).

"26. Neither the State or City can, by any legislation or resolution or any plan adopted pursuant to any legislation or resolution enacted subsequent to the deeds to Appleby and Latou in 1852 and 1853 respectively, deprive the plaintiffs or their predecessors in title of any of their title and rights."

(fol. 445).

"27. If the resolutions and plans adopted under any of the legislation or acts hereinbefore referred to be construed as authorizing the City of New York to convert the plaintiffs' premises or any part thereof into slips and basins for the purpose of lengthening the alleged piers in the streets, they are invalid, as violating, first, Article 1, Section 10, Part 1 of the Constitution of the United States, by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law and taking their property for public use without just compensation."

(fol. 446), all of which the Court refused (fol. 438) and to which plaintiffs duly excepted (fols. 621-622).

Third. The Court erred in holding that the grant, of the premises (which was made pursuant to Chapter 182 of the Laws of 1837) was "not absolute and unqualified but was subject to the rights of the public" (235 N. Y. 351 at bottom of p. 360), and in refusing to hold that (fol. 437)

"20. Chapter 182 of the Laws of 1837 was an integral part of the contract expressed by the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Appleby and Latou, the predecessors in title of plaintiffs,"

and that

"12. The rights of the plaintiffs should be determined according to the statutes in force when the deeds to their predecessors in title were made," (fol. 411),

to which refusal (fol. 437) plaintiffs duly excepted (fol. 621).

Fourth. That the Court erred in changing the state law, which it had repeatedly affirmed, and which had become a rule of property, upon which petitioners and their predecessors in title relied in the payment of large sums of money to the City of New York for the consideration expressed in the deeds and the taxes upon the premises in question.

The Court says in its opinion that "The State succeeded to the *jus publicum* of the English Crown and not to the *jus privatum*," which is contrary to the true doctrine, often enunciated and repeated that the State succeeded to all the rights and title of both the King and Parliament of England, subject only to Constitutional restrictions (*Lansing v. Smith*, (N. Y. 1829) 4 Wendell 9 at p. 20), which *Furman v. The City of New York*, (N. Y. 1851) 5 Sandford 16 at the bottom of page 33 says was "the fee simple of the soil", "valid by the highest authority Mayor etc. of New York v. Whitney, in the Court of Appeals, not reported", (8, C. p. 34). And so on through the century the Court of Appeals consistently and continuously held



in construing deeds similar to those of the present case, in numerous volumes such as *Duryea v. Mayor*, 62 N. Y. 592, and particularly in the famous leading case of *Langdon v. Mayor* 93 N. Y. 129 at page 155 that

"In this country the State has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State."

The identical language is repeated in the case of *People v. Steeplechase Park*, 218 N. Y. 459 at p. 471.

Such established doctrine has been stated and upheld as the law by the U. S. Supreme Court recently in *Seattle v. Oregon & Washington R. R. Co.* 255 U. S. 56.

Another well settled rule of property established by said Court as to similar deeds from the City, is that the grantee of the City could fill in and improve the premises at his pleasure without the consent of the City. *Duryea v. Mayor*, 62 N. Y. 592, 596, 96 N. Y. 477, *Mayor v. Law*, 125 N. Y. 380, 391, and as to same avenue, that the grantee could fill in the property as far westerly as 13th Avenue at any time. *Matter of City of New York (American Ice Co.)* 193 N. Y. 503, 519, *American Ice Co. v. City of New York*, 217 N. Y. 402, 420, which the court now changes. *Matter of Appleby v. Delaney*, 235 N. Y. 364.

These questions as to the State law were an issue at the trial, and alleged in the petition and briefs. It was urged by petitioners, that if the Court changed the State law upon the subject, that the Court would be violating the doctrine established by the U. S. Supreme Court in *Muhlker v. N. Y. & Harlem R. R. Co.*, 197 U. S. 544.

The ruling in the present case deprives petitioners of the right acquired by contract, of equal protection of the laws, and takes from them their property and rights, without compensation, and confiscates the \$74,426.01 in taxes paid, in violation of the Constitution of the United States.

Fifth. The Court also erred in holding that

"The City of New York in the execution of its plans for the improvement of the waterfront westerly of" the Federal bulkhead" line for the purpose of navigation invaded no rights of plaintiffs" 235 N. Y. 351, 361.

In respect to which the plaintiffs asked the Trial Court to decide that

"23. Section 819 of the Greater New York Charter and Chapter 372 of the Laws of 1907 did not authorize the carrying into effect of any change of plans for the improvement of the water front between West 38th Street and West 42nd Street, North River, Borough of Manhattan, without compensation for plaintiffs, property and rights taken thereby."

23a. If said provision and act mentioned in next preceding conclusion of law are construed as authorizing the adoption of a plan

for said water front so as to deprive plaintiffs of their property and rights, without compensation, then such provision and act are invalid as violating first, Article 1, Section 10, Part 1 of the Constitution of the United States by impairing the obligation of a contract; and second, in violation of Article XIV (Section 1) of the amendments of the Constitution of the United States and Article 1, Section 3 of the Constitution of the State of New York, by depriving the plaintiffs or their predecessors in title of their property and rights without due process of law and taking their property for public use without just compensation." (Fols. 440-442), which the Court refused (fol. 437), and to which plaintiffs duly excepted (fol. 621).

Sixth, The Court also erred in its interpretation of the contract as expressed by Ch. 182 of the Laws of 1837 and the City deeds to the grantees, which interpretation is contrary to the authority expressed in the said statute, to the intent of the parties, to the settled law of the State, and deprives plaintiffs of equal protection of the laws and of their property and rights without compensation.

That the present judgment and decision permits the City to retake petitioners' premises for the City plan without compensation, and without due process of law, and to continue to occupy same as slips and basins, as it is doing, at great gain to the City, while it exacts additional sums from petitioners in taxation, and may even destroy the petitioners' title by taxation beyond endurance.

By reason whereof petitioners and plaintiffs in error pray that the said judgment of the said Court of Appeals may be reversed and the petitioners' rights and title be pronounced according to the settled law and true theory, and that the petitioners recover for the invasion of their property and rights, and until compensation be made or secured, that the defendants be enjoined.

Dated, August 15, 1923.

Barton Moore, Attorney for Petitioners and Plaintiffs in Error.

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#### COURT OF APPEALS OF THE STATE OF NEW YORK

EDGAR S. APPLEBY AND JOHN S. APPLEBY, Individually and as Executors of the Last Will and Testament of Charles E. Appleby, Deceased,

vs.

THE CITY OF NEW YORK et als.

#### ORDER ALLOWING WRIT OF ERROR

On reading of the petition of Edgar S. Appleby and John S. Appleby individually, and as executors, etc., aforesaid for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Court of Appeals of the

State of New York as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioners and plaintiffs in error give security in the sum of One thousand (\$1,000) dollars, that the said plaintiffs in error shall prosecute said writ of error to effect and, if said plaintiffs in error fail to make their plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiffs in error now presenting a bond in the sum of One thousand (\$1,000.) Dollars with National Surety Company as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 17 day of August, 1923.

Frank H. Hiscock, Chief Judge of the Court of Appeals State of New York.

BOND OF WRIT OF ERROR [For \$1,000.00; filed and approved Aug. 17, 1923; omitted in printing]

#### CITATION

UNITED STATES OF AMERICA, ss:

The President of the United States to George P. Nicholson, Esq., Corporation Counsel, Atty. for the City of New York, and Stetson, Jennings & Russell, Esqs., Attys. for Weehawken Stock Yard Co., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court, New York County, wherein Edgar S. Appleby and John S. Appleby are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Judge of the Court of Appeals of the State of New York, this 17 day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York. (Seal.) Attest: R. M. Barber, Clerk of the Court of Appeals of the State of New York. [Seal of the Court of Appeals, State of New York.]

## WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Court of Appeals of the State of New York, and the clerk of the Supreme Court, New York County, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said matter before you or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Edgar S. Appleby and John S. Appleby, individually and as executors under the Last Will and Testament of Charles E. Appleby, deceased, and The City of New York, Eben E. Oleott, Central Railroad Company of New Jersey, New York Butchers' Dressed Meat Company, New York Horse Manure Transportation Company, Burns Bros., New York Stock Yards Company, Weehawken Stock Yards Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was partly against and partly in favor of their validity; and wherein was drawn in question the validity of a State statute or of an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity, and wherein in a title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, statute, commission or authority, the manifest error hath happened to the great damage of the said Edgar S. Appleby and John S. Appleby, individually and as executors, etc. aforesaid as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this appeal, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 21st day of August, in the year of our Lord, One Thousand, Nine Hundred and Twenty-Three.

Alex Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York. [Seal of the District Court of the United States, Southern District of N. Y.]

allowed by Frank H. Hiscock, Chief Judge Court of Appeals,  
 te of New York.

[File endorsement omitted.]

A copy of the within paper has been this day received at the Office  
 the Corporation Counsel.  
 Aug. 24, 1923.

George P. Nicholson, Corporation Counsel.

Copy Received Aug. 24, 1923. Stetson, Jennings & Russell.  
 Rec'd on application for writ of error Aug. 17, 1923. Frank H.  
 iscock, Chief Judge.

AT A SPECIAL TERM OF THE SUPREME COURT, PART II THEREOF,  
 HELD IN AND FOR THE COUNTY OF NEW YORK, AT THE COUNTY  
 COURT HOUSE, ON THE — DAY OF AUGUST, 1923

Present: Honorable William Harmon Black, Justice.

[Title omitted]

#### ORDER TRANSMITTING RECORD

Upon reading the annexed affidavit of Banton Moore, verified  
 August 28th, 1923, and upon the writ of error herein allowed by the  
 Chief Judge of the Court of Appeals and issued by the Clerk of the  
 District Court of the United States for the Southern District of  
 New York, dated August 17th, 1923, now, on motion of Banton  
 Moore, attorney for the plaintiffs, it is

Ordered that the order of the Court of Appeals be and the same  
 hereby is made the order of this Court and that the Clerk of this  
 Court transmit to the Clerk of the Supreme Court of the United  
 States, the original writ of error and papers annexed, except the origi-  
 nal bond, which he shall keep in his files together with a copy of said  
 writ of error and papers annexed, as required by law.

Enter.

(622)

No. 532163

Office Supreme Court, U. S.

FILED

SEP 6 1925

SUPREME COURT  
OF THE UNITED STATES.

WM. R. STANSBURY  
CLERK

OCTOBER TERM, 1925

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and Executors of the Last Will and Testament of Charles E. Appleby, deceased,

Petitioners,

—against—

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,

Respondents.

**Petition for writ of certiorari to review a decision of the Court of Appeals of the State of New York, and brief in support thereof.**

The River and Harbor Act of 1899 (30 Stat. 1151-1155). Bulkhead and pierhead lines. Erroneous interpretation by State Court of said act and authority so as to take private property without compensation and thereupon misapply state legislation which had been repealed or ineffectual. Violation of rights acquired by contract, under the protection of the Constitution of the United States by change of state law, which has been a rule of property for about 100 years.

Retaking by said City for proprietary use in violation of the Constitution of the United States and contrary to state statutes and decisions.

This cause arose in the New York Supreme Court, decision and judgment modified and affirmed in Appellate Division, affirmed in Court of Appeals by decision and opinion conflicting.

BANTON MOORE, Attorney for Petitioners.

CHARLES HENRY BUTLER, Counsel for Petitioners.

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SUPREME COURT  
OF THE UNITED STATES.

OCTOBER TERM, 1923.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and Executors of the Last Will and Testament of Charles E. Appleby, deceased,  
Petitioners,

—against—

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,

Respondents.

*Sirs:*

PLEASE TAKE NOTICE, that at the opening of the Supreme Court of the United States on Monday, October 1, 1923 (or as soon thereafter as counsel can be heard), I shall present to the Court the annexed petition for a writ of certiorari to review a decision and judgment of the Court of Appeals of the State of New York and orders and judgment entered thereupon, in the above entitled case, a copy of such petition, and brief in support thereof, being hereby served upon you.

New York, August 25, 1923.

BANTON MOORE,

Attorney for Petitioners,

110 William Street,

To:

New York, N. Y.

GEORGE P. NICHOLSON, Esq.,

Corporation Counsel.

STETSON, JENNINGS & RUSSELL, Esqs.,

Attorneys for Respondent

Weehawken Stock Yards Company.



IN THE  
SUPREME COURT  
OF THE UNITED STATES.

OCTOBER TERM, 1923.

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EDGAR S. APPLEBY and JOHN S. APPLEBY, individ-  
ually and as Executors of the Last Will and  
Testament of Charles E. Appleby, deceased,  
Petitioners,

—against—

THE CITY OF NEW YORK and WEEHAWKEN STOCK  
YARD COMPANY, impleaded with others,  
Respondents.

---

**Petition of plaintiffs for a writ of certiorari  
to review a decision of the Court of  
Appeals of the State of New York.**

*To the Honorable the Supreme Court of the  
United States:*

The petition of Edgar S. Appleby and John S. Appleby, individually and as executors of the Last Will and Testament of Charles E. Appleby, deceased, respectfully shows:

That the Court of Appeals of the State of New York, which is the highest State Court, rendered a final decision and judgment herein, which

(1) Erroneously interprets The River and Harbor Act and the authority of the Secretary of War thereunder, contrary to the wording and intent thereof, and upon such interpretation,

(2) Holds that two State statutes prohibited petitioners from using their property, although the first act (Ch. 763, Laws of 1857) was unconstitutional and repealed, and the second act (Ch. 574 of the Laws of 1871) specifically protected private property, and

(3) Denies relief to petitioners although it was alleged and shown and not denied that the City of New York, under a condemnation proceeding, built piers in the streets and excavated petitioner's land between the streets for slips and basins, according to the City Plan and collects large revenue therefrom.

The facts show a clear retaking without compensation, by said City of the property and rights, which it sold for value, and upon which the City collects taxes, to the extent of \$74,426.01 up to the trial of this action.

The ruling of the Court is far-reaching and of grave concern. It is also of public importance that the Federal power and authority here involved, which affects vast property interests, be correctly construed.

The petitioners are the owners of "certain water lot(s) or vacant ground and soil under water to be made land and gained out of the Hudson or North River" (fol. 1100) in the City of New York, between Twelfth and Thirteenth Avenues, West 39th and West 40th Streets, West 40th and West 41st Streets, which their predecessors had purchased for value from said City by two certain deeds in evidence. The City derived its title direct from the State by Legislative act (Ch. 182, Laws 1837) which granted "all the right and title of the people of the State," the highest possible title and right.

This suit was brought to enjoin the appropriation aforesaid and for damages. The Courts enjoined the dredging inside the bulkhead line but refused to provide for compensation or damages for the appropriation, except that in the Appellate Division of the Supreme Court, in the *Matter of Appleby v. Hulbert*, Commissioner of Docks (199 App. Div. 552), that Court ordered that in thirty days after entry and service of its order the commissioner to issue a permit to petitioners to improve their property unless the City brought a proceeding to acquire same in which event the writ should be deemed stayed for a reasonable time (fols. 215-219). But the Court of Appeals reversed this order (235 N. Y. 364).

Therefore, the petitioners are deprived of everything except a record title and the burden of taxation. The ruling of the Court, upon which this result was reached is that

"When the Secretary of War established the bulkhead line, the title of the State, the City and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation" (235 N. Y. 351, 361 and judgment fol. 1654 of Record).

This is not correct. There are valuable pier, wharf and water rights "beyond such line" and inside the pier-head line, which the Court overlooked. This error is apparent from the language of the Federal act and authority, and from the facts of this case.

Section 10 of the River and Harbor Act, *supra*, says:

"That the creation of any obstruction not affirmatively authorized by Congress, to the

navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, \* \* \*

and Section 11 says:

"That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him. \* \* \*

In both sections the word "*lines*" is plural.

The Secretary of War, in exercising his authority, caused to be written upon War Department maps, of which an extract for this locality, is in evidence as City's Exhibit C, the following legend:

"The bulkhead line defines the limit for solid filling; the pierhead line, is the limit to which *open piled structures may be built.*" (Italics ours.)

The Secretary of War established *two* lines here. The bulkhead line across the property in question and the pierhead line far *beyond* it.

It is obvious that the bulkhead line only limited *solid* or earth filling and did not limit the building out to the pierhead line of piers, wharfs and any other "open piled structures," which the act and authority specifically says "may be built."

As petitioners' property is entirely within the pierhead line, there is no "subordination" to public use, but specific permission for private use. Furthermore, the public does not use the property. It is occupied only by the defendants herein. The public use was extinguished by Ch. 182 of the Laws of 1837.

The facts also show this. On the maps in evidence are all sorts of "open piled structures" inside the pierhead line. There can not be public navigation under or over pier, sheds, ferry rack and other structures nor in these slips and basins where the defendant lessees herein moor their boats, floats and watercraft, and pay the City for the exclusive privilege.

The Court states that the ruling applies to "the City," but petitioners are the only sufferers from it herein. As to them, the authority of the Federal bulkhead line is construed to destroy the authority of the Federal pierhead line. As to the City, the Federal act and authority is interpreted to permit an unlawful retaking and to revive void and ineffective State legislation.

Two State Statutes are alleged (fols. 226-234) and held (fol. 1634) to have "prohibited" petitioners from filling in or erecting any structures whatsoever upon their property.

The first act, Ch. 763 of the Laws of 1837, in so far as it purported to effect petitioners or their property would be unconstitutional, but it was clearly superseded and repealed, as appears from brief annexed.

The second act, Ch. 574 of the Laws of 1871, specifically provided that it should not interfere with private property or rights theretofore conveyed by the City, as in the present case, until compensation was made. The Court of Appeals has so held in previous cases, cited in brief annexed.

The petitioners duly requested the Court to decide at the trial that if the said acts were construed against them that they violated certain provisions of the Constitution of the United States. The Court would have made this ruling, apparently, if it had not been confused as to the effect of the Federal bulkhead line, aforesaid.

The petitioners own a space of about 200 feet between each street and the City owns 60 feet in the bed of each street. The petitioners' title to the "intervening spaces" is dominant and the title of the City to the streets is servient and "in trust," by the contract in the deeds and by the settled law, yet the Court holds here, that the petitioners cannot build a pier or wharf on their property although the City can build sheds, etc., in the streets.

The effect of this ruling is that petitioners must give back their property without compensation, to the trustee who violates its contract.

The Court also erred as to the law upon this important subject as pronounced in its many previous decisions, and as stated by the Supreme Court of the United States. Petitioners' rights herein were acquired by contract and have come under the protection of the Constitution of the United States, and the State Court is without power to change its decision in such event.

For the reasons set forth in this petition and brief annexed, your petitioners submit that the decision of the Court of Appeals is contrary to law, and although a writ of error has been granted in this cause under Judicial Code, Section 237, petitioners being advised by counsel to present this petition out of greater caution, pray in the alternative, either (1) that a writ of certiorari may be issued out of and under the seal of this Court,

directed to the Clerk of the Supreme Court, New York County, commanding him to certify and send to this Court on a day certain to be designated in the writ, a full and complete transcript of the record and of all proceedings of said Court of Appeals of the State of New York in this action, to the end that the same may be reviewed and determined in this Court as provided in Section 237 of the Act of Congress known as the Judicial Code, and the said final decree of the said Court of Appeals in this action and every part thereof may be reversed by this Honorable Court and the action remanded with directions to grant the application prayed for in the petition, or (2) that consideration of this petition be deferred until the hearing on the said writ of error, and your petitioners pray for such other and further relief as may be just and equitable.

Dated, August 25, 1923.

EDGAR S. APPLEBY and  
JOHN S. APPLEBY,

*Individually and as Executors  
of the Last Will and Testa-  
ment of Charles E. Appleby,  
deceased, Petitioners.*

CHARLES HENRY BUTLER,  
*Counsel for Petitioners.*

State of New York,  
County of New York—ss.:

EDGAR S. APPLEBY being duly sworn, says:  
That he is one of the petitioners herein, united  
in interest and pleading together with said John  
S. Appleby, the other petitioner. That he has  
read the foregoing petition, and that the same is  
true and correct to the best of his knowledge,  
information and belief.

EDGAR S. APPLEBY.

Sworn to before me this  
25th day of August, 1923.

AUGUST A. FINK,  
Notary Public, Kings Co. No. 96.  
New York Co. Clerk's No. 226.  
Term expires March 30, 1924.

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I, CHARLES HENRY BUTLER, attorney and coun-  
selor at law, duly admitted to practice in this  
Court, do hereby certify that I have examined  
the foregoing petition for Writ of Certiorari;  
that although a Writ of Error has been granted,  
the true scope and extent of the authority there-  
fore is doubtful, rendering the petition for cer-  
tiorari necessary for the proper protection of my  
clients' rights in the premises; that the petition  
is not made for delay, but is meritorious and well  
founded in law and ought therefore be granted.

Dated, August 25, 1923.

CHARLES HENRY BUTLER,  
Counsel for Petitioners.



IN THE  
SUPREME COURT  
OF THE UNITED STATES.

OCTOBER TERM, 1923.

---

EDGAR S. APPLEBY and JOHN S. APPLEBY, individ-  
ually and as Executors of the Last Will and  
Testament of Charles E. Appleby, deceased,  
Petitioners,

—against—

THE CITY OF NEW YORK, *et als.*,  
Respondents.

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**BRIEF IN SUPPORT OF WRIT.**

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***Statement.***

From its inception as a state and until the year 1837 the State of New York was the absolute owner in fee of certain premises hereinafter described, being an inshore part of the submerged lands along the Hudson River in said State, and had the power and right to fill in and improve same, or, to grant its title and rights to individuals, for that purpose.

The shore line of the Hudson River was very irregular and it was deemed for the public interest to fill in the shallow tide water flats and have a straight ripa with exterior avenue as shown on map by Geo. B. Smith dated 1835 (Plaintiffs' Exhibit 1). This has been done all

around Manhattan Island, and many other cities and localities.

In 1837, by Chapter 182 of the New York Laws of 1837, the State (1) established said permanent ripa and exterior avenue along the Hudson River, (2) extended and established the City streets and avenues out to the ripa, (3) vested the City of New York with "all the right and title of the people of the State" to the lands then under water, and (4) provided that adjacent owners have the pre-emptive rights to grants from said City.

In 1852 and 1853, said City sold and conveyed to petitioners' predecessors in title, for \$11,306.87 (fols. 1100, 1132) "certain water lot(s) or vacant ground and soil under water to be made land" by metes and bounds description along the established streets and avenues, together with the wharfage, etc., on the exterior avenue or ripa, "saving and reserving," the bed of the streets and avenues "*for uses and purposes of public streets, avenues and highways*" (fol. 1104), which "*shall forever thereafter continue to be and remain public streets and avenues and highways,*" etc. (fol. 1114) and also "excepting" the wharfage "in front of the entire width" of the streets at the westerly side of Thirteenth Avenue, or permanent ripa. (Italics ours.)

These deeds are printed at pages 367-388, and contain maps of the property conveyed.

In 1857, by Chapter 763 of the New York Laws of 1857, the State attempted to re-establish a bulkhead line 100 feet west of Twelfth Avenue, considerably inshore of the "permanent" line of 1837. This act was superseded and repealed as hereinafter shown.

In 1871, by Chapter 574 of the New York Laws of 1871 (amending Chapter 137, Laws 1870), the Dock Department of the said City was created, and authorized to adopt a plan for improving the submerged lands owned by the City, and to acquire all property not owned by the City, without interference with private property or rights.

In 1890, the Secretary of War, pursuant to *River and Harbor Act*, established a bulkhead line 150 feet west of 12th Avenue and parallel therewith, also a pierhead line 700 feet west of and parallel with the bulkhead line at the premises in question. The bulkhead line passes through petitioners' property and the pierhead line *far beyond it*.

In 1894 the City commenced a proceeding to acquire petitioners' property and rights (fols. 1189 *et seq.*). The Board of Estimate and Apportionment of the City adopted a resolution discontinuing said proceeding in 1914, one day after a motion was made by petitioners to go ahead with it.

At various dates during the pendency of the condemnation proceeding, which was delayed for lack of funds, the City erected piers in the streets and dug out petitioners' property for slips and basins, all according to the City plan of 1871.

Upon completion of the piers, slips and basins, the City rented same under permits and long leases for great revenue.

The facts are not disputed, showing a complete appropriation without compensation, contrary to statutes in such cases made and provided.

## POINT I.

### **Erroneous interpretation of Federal and State acts and authority affecting a subject by great importance.**

The case presents a Federal question. *U. S. v. Bellingham Bay Boom Company*, 176 U. S. 211, 218.

It has been shown in the petition herein that the ruling of the Court of Appeals is contrary to the Federal Act and authorities and for the sake of brevity will not be repeated here.

It can now be shown that upon such ruling the Court erred as to State legislation. The State never intended to resume any power or authority (which had been relinquished for value) over the premises in question, or to restore the public use, or to vest in the City the proprietary use of petitioners' property for slips and basins, without compensation.

The Court decided that

"32. The Federal Statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and though the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to building of piers, wharves or docks within said space, the said Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the laws of 1857 provided that no piers should be erected within 100 feet of another

pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue" (fols. 1654-1656).

This is error.

The Federal acts and authorities did not validate State legislation which was otherwise repealed, invalid, ineffectual, and unconstitutional as construed above.

The legislation of 1857 and 1871 was subsequent to Ch. 182 of the Laws of 1837. Also, it does not apply.

Ch. 763 of the Laws of 1857 in so far as it attempted to establish a bulkhead line, was concededly superseded by the act of 1871. Section 2 of the act which provided that no pier should be within 100 feet of another pier, was re-enacted as Section 731 in Ch. 410 of the Laws of 1882, an act to consolidate all the laws of the City. The provision was omitted from the Charter of the Greater City in 1897 and has never been re-enacted. The Charter now contained different provisions and Section 819 repeals all laws inconsistent therewith. Therefore, the Act of 1857 is repealed directly and by implication. The Court, in another part of the decision, holds it does not affect petitioners. Where two rulings

are inconsistent, the one most favorable to appellant controls, and here the favorable ruling is the correct one.

The Act of 1871 (Ch. 574) specifically provided that no authority exercised thereunder should interfere with private property (as in the present case) and contained definite directions as to purchase by City by treaty or condemnation. "Private rights were saved under that Act" (*Langdon v. Mayor, etc.*, C. N. Y., 93 N. Y. 129, 161 and many other cases).

By now holding that private rights were "prevented" (fol. 1655) or destroyed by the act of 1871, the Court rules contrary to the text of the statute and changes its own decision.

## POINT II.

### **Decision, contrary to the settled law of the United States and, changing State law.**

In addition to the change of ruling just noted as to the Act of 1871, the Court has also changed its decision in reference to the title and power of the State to convey submerged inshore lands, and particularly its specific decision of long standing as to title and rights conveyed by City deeds similar to those in the present case.

As to the title and power of the State, it has long been settled that upon separation from England the thirteen original States, of which New York was one, possessed all the rights and title of Crown and Parliament in submerged lands and navigable waters over them, to-wit: the *jus privatum* and the *jus publicum*.

In the Federal Constitution the States granted to Congress the power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes" (Art. 1, Sec. 8, p. 3).

"The character of the State's ownership in the lands and in the waters is the full proprietary right. The State is the absolute owner of the lands and of the water over them" \* \* \*. The State "is free to convey tide lands," subject to the constitutional restriction aforesaid. *Seattle v. Oregon & W. R. R. Co.*, 255 U. S. 56, at p. 63 and cases cited.

"The State may even dispose of the usufruct of such lands, as is frequently done \* \* \* by the reclamation of submerged flats and the erection of wharves and piers and other adventitious aids of commerce", *Hardin v. Jordan*, 140 U. S. 371, 382, quoted with approval *Shively v. Bowlby*, 152 U. S. 1, 46.

Other words and phrases used to define the State's title and right to convey, are "plenary", "absolute fee", "fee simple absolute", "the whole title", "all the right and title", "the source of authority", "the *jus publicum* as well as the *jus privatum*", subject to the right of Congress to regulate commerce, as aforesaid. Cases above cited and *Montgomery v. Portland*, 190 U. S. 89, *St. Anthony Falls Water Power Co. v. St. Paul Commissioners*, 168 U. S. 349, *Langdon v. Mayor, etc.*, 93 N. Y. 129, 155, and numerous others.

Such title and right, unquestionably includes the power of the State by legislation to extinguish the *jus publicum* or, public use over a portion of the submerged lands between the shore and the channel, *Langdon* case, p. 160, *supra*; *Williams v. Mayor, etc.*, 105 N. Y. 419 (as in the present case), but does not justify unreason-

able grants of the whole waterway so as to destroy the public use entirely. *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 453; *Matter of Long Sault Development Company*, 212 N. Y. 1, 242 U. S. 272; *Core v. State of New York*, 141 N. Y. 396.

The cases of reasonable grants are in complete harmony with those of unreasonable or void grants, as shown by the citation with approval of the *Langdon* case, *supra*, in the *Core* case, *supra*, at p. 407, and in *Long Sault* case, *supra*, at p. 8. The Court overlooks this, as is shown by its citations and reference to destroying "the navigability of the Hudson."

This case does not involve any unreasonable grant, but on the contrary a question as to who is entitled to the use and benefit of a reasonable one, the parties who paid for it, or the corporation that sold it.

The important point is, that the deeds in the present case are *City* deeds, which have been continuously construed by the State's highest court as reasonable grants for the benefit of the people, and as conveying an "absolute" title subject only to Federal power. The following resume of decisions will show this clearly and that the Court was confused by rulings as to "limited grants," "licenses," "permits," "privileges," "riparian rights," etc. It was error to confuse those cases with absolute deeds by City of "all the right and title of the people of the State." There is no uncertainty or doubt as to the previous decisions of the Court as to City deeds. It is inconceivable that the "public use" should continue over the "intervening spaces" inside the "permanent ripa."

A. The City deeds, all similar, vested in the grantees an "absolute fee" with "immediate possession" and right "to fill in or improve at their



pleasure," subject only to Federal regulation. This has been held in many cases, the leading authorities being *Langdon v. Mayor, etc.*, 93 N. Y. 129, 149, 159; *Durycia v. Mayor, etc.*, 62 N. Y. 592, 597; *same case*, 96 N. Y. 477, 488, 497; *Williams v. Mayor, etc.*, 105 N. Y. 419, 432; *Mayor, etc. v. Law*, 125 N. Y. 380, 391; *Furman v. Mayor, etc.*, 10 N. Y. 567, 568.

The point seems to have been well settled and reiterated from 1829 up to the present decision.

Judging from the citations by the Court, its confusion seems to have arisen as to a "trust", which the State has, in the public channel of navigable waters, *Long Sault Der. Co. case, supra*, and which the City of New York has in and to its streets, *Knickerbocker Ice Co. v. Forty-second St. R. R. Co.*, 176 N. Y. 408, 418; *Matter of Mayor, etc.*, 193 N. Y. 503, and *American Ice Co. v. City of N. Y.*, 217 N. Y. 402. With this distinction, the above cases are in harmony with the *Langdon case, supra*.

Cases cited by the Court and involving different legislation, and riparian rights should be noted.

*People v. Vanderbilt*, 26 N. Y. 287, was different legislation for a specified purpose only. No power in City to grant to individual. Purpose abandoned. Grant void. Sustains A.

*People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, 79-80, was a limited grant, "privilege" or license of *jus privatum*. Discusses *jus publicum* and sustains A. The Court herein failed to notice this, as clearly shown by its opinion.

*Core v. State*, 144 N. Y. at pp. 405, 406, was a concededly unreasonable and extravagant grant (404) of vast domain (405) by void legislation against public interest. Distinguishes grants

"around Manhattan Island" and approves *Langdon* case (407).

*Sage v. Mayor*, 154 N. Y. 61, 73 and *Matter of City of N. Y. (Speedway)*, 168 N. Y. 134, were merely riparian right cases, which distinguish and approve *Langdon* case.

*Lewis v. Blue Point Oyster Co.*, 198 N. Y. 293, was a mere right to plant oysters under *jux pri-ratum* grant impaired by Federal Government dredging channel. Cites, distinguishes and approves *Langdon* case (293, 296).

*Montgomery v. Portland*, 190 U. S. 89, illustrates the point we have made as to the erroneous interpretation in the present case of the Federal Act and Authority. In citing the *Montgomery* case, the Court overlooks the distinction, to wit, that *Montgomery* was a riparian owner *without* a grant and that petitioners are absolute owners with a *grant*. Such legislation as Ch. 182 of the Laws of 1837 and the City deeds are absent in the *Montgomery* case.

*Town of Brookhaven v. Smith*, 188 N. Y. 74 and *Barnes v. Midland R. R. Terminal Co.*, 193 N. Y. 378, are riparian right cases, entirely different from present case. It might be noted, however, that in said cases, the Court held that the "littoral owner" *without* a grant could maintain a pier, although the Court holds in the present case, that the littoral owner *with* the highest type of grant known to law, can *not* do so.

*First Construction Co. v. State of N. Y.*, 221 N. Y. 295, involved grant without consideration of a mere privilege or license (p. 316), which conveyed no title.

*Tiffany v. Town of Oyster Bay*, 234 N. Y. 15, involved riparian rights and is not in point.

*Matter of Public Service Commission*, 224 N. Y. 211, was a commerce grant made 30 years after 1855 legislation, and therefore taken subject thereto.

There is not a single authority which has been or can be cited by the Court to justify its change of State law, upon which the petitioners and their predecessors in title relied, as well as upon the legislation and the contract in the deeds, in paying large sums therefor, in complying with the covenants therein and in paying \$74,426.01 taxes upon the premises in question. The Court is without power to change its ruling so as to take away petitioners' rights acquired by contract which have come under the protection of the Constitution of the United States. *Muhlker v. N. Y. & Harlem R. R. Co.*, 197 N. Y. 544, 570.

### POINT III.

#### **Impairment of obligation of contract and taking without compensation.**

The Court of Appeals has denied petitioners protection of their property and rights, although flagrant violations of the contract in the deeds are admitted.

1. The contract in the deed is to fill in or improve with wharves, the granted premises, for the grantees' use,—not to dig out same for City's use. The deeds were made when the Federal power lay dormant, but the Federal authorities by the adoption of bulkhead and pierhead lines,

specifically approved the filling in of a part and the erection of "open piled structures" on the remainder of petitioners' property.

2. The City conveyed and covenanted the wharfage on the westerly side of 13th Avenue, but has erected a pier and basin inshore thereof, and even inshore the Federal bulkhead line, over all of petitioners' property, and takes all the wharfage and rents therefrom. The *only* wharfage which the City excepted or retained in the deeds, was at the *end* of the streets, to wit, the westerly side of Thirteenth Avenue.

3. The entering wedge of the City's wrong was the construction of "pier approaches" in the streets. Having done this under the cloak of a condemnation proceeding and continued the wrong for some years, it then shedded or enclosed the piers and excavated petitioners' property for slips and basins. All of which was contrary to covenants and agreements of the parties that (a) grantees have the prior right to build the streets, which were to remain "public highways forever." Even the possible easements in the streets are destroyed by sheds and other structures in the streets. *Story v. N. Y. El. Ry.*, 90 N. Y. 122, involving similar deed from City.

Every bit of petitioners' property and rights between 12th and 13th Avenues conveyed and covenanted by City by authority of the people, in Legislature (Ch. 182 of Laws 1837), and City deeds, have been appropriated or violated, without compensation. This cannot be excused by Federal Acts. Petitioners duly alleged at the trial, the violation of their constitutional rights (fols. 438-450).

It must be apparent that a grantor cannot take back property without compensation and collect great revenue therefrom, and at the same time levy taxation on the property and collect it from the grantees. This fact itself, shows the injustice of the decision and the necessity of protection.

Relief to petitioners will afford justice and not harm the City, as it gets a dollar returned on every dollar expended. *Langdon case, supra.* § 161.

From what has been said it appears that the subject matter is not only of vital importance to petitioners but is of broad public interest, and affects vast property rights nationally, as well as locally.

### **CONCLUSION.**

WHEREFORE, the petitioners pray in the alternative:

1. That a writ of *certiorari* issue forthwith;  
or
2. That, since a writ error has been allowed herein under Judicial Code, Section 237, the consideration of this petition be deferred until the hearing on the writ of error.

Dated, New York, August 25, 1923.

Respectfully submitted,

BANTON MOORE,  
*Attorney for Petitioners.*

CHARLES HENRY BUTLER,  
*Counsel for Petitioners.*

## APPENDIX.

### Opinion of the Court of Appeals per Mr. Justice Pound.

EDGAR S. APPLEBY, *et al.*, individually and as Executors of Charles E. Appleby, deceased, Appellants and Respondents, v. THE CITY OF NEW YORK, *et al.*, Respondents and Appellants.

CROSS-APPEALS from judgment of the Appellate Division, First Department, modifying and as modified, affirming a judgment of Special Term in favor of plaintiffs.

SPOTSWOOD D. BOWERS and BANTON MOORE, for Plaintiffs, Appellants and Respondents.

JOHN P. O'BRIEN, Corporation Counsel (Charles H. Nehrbas, of Counsel), for Defendant, Respondent and Appellant, the City of New York.

STETSON, JENNINGS & RUSSELL, for Weehawken Stock Yard Company, Intervener.

POUND, J.:

This is an action to restrain the City of New York and other defendants from interfering in any way with the use and enjoyment of plaintiffs' lands under the water of the Hudson River between Thirty-ninth and Fortieth Streets and between Fortieth and Forty-second Streets, offshore of Twelfth Avenue in the Borough of Manhattan.

Title to the premises was vested in the City of New York by grants under the Colonial Charter

*Opinion of Court of Appeals.*

of Governor Dongan in 1686. By Chapter 115, Laws of 1807, the commissioners of the land office were directed to issue letters patent to the City granting to it all the right and title of the state to the lands under water at the locality, extending from low-water mark, four hundred feet into the river. By Chapter 182, Laws of 1837, Thirteenth Avenue as laid out on the George B. Smith map, so-called, was declared to be the permanent exterior street or avenue in the city along the easterly shore of the Hudson River between the southerly line of Hammond Street and the northerly line of One Hundred and Thirty-fifth Street. The City of New York was vested with all the right and title of the people of the state to the lands under water extending from the westerly line of the lands granted by the Act of 1826 to the westerly line of Thirteenth Avenue, so laid out. The street lines were laid out over the lands under water thus conveyed. Chapter 225, Laws of 1845, authorized the adoption of the ordinance known as the sinking fund ordinance which empowered the City to make the grants hereinafter mentioned.

On or about December 24, 1852, the City issued to one Latou a grant of a portion of the lands in suit, describing the same as a "water lot or vacant ground and soil under water to be made land and gained out of the Hudson." Another like grant was issued to the predecessor of plaintiffs on or about August 1, 1853, of the remaining portion of the lands. Plaintiffs claim title under these grants. The westerly line is the westerly line of Thirteenth Avenue. The easterly line is the line of original high-water mark, which runs between Eleventh and Twelfth Avenues. The

*Opinion of Court of Appeals.*

grants were made for a substantial consideration. The streets were reserved to the City out of the granted premises and the grantees agreed to build streets and wharves when directed by the City. No such direction has been given.

By Chapter 121, Laws of 1855, a commission was appointed to prepare plans for the improvement of New York Harbor. By Chapter 763, Laws of 1857, bulkhead and pier lines were established for the port of New York. A bulkhead line or line beyond which solid filling should not extend was established about 100 feet west of the westerly line of Twelfth Avenue. This line was some distance east of Thirteenth Avenue as laid out on the map. Under Chapter 574, Laws of 1871, a further plan for the improvement of the water front moved the bulkhead line fifty feet farther out into the river and laid out piers eighty feet in width at the foot of Thirty-ninth, Fortieth and Forty-first Streets.

In 1890 the latter line was established as a bulkhead line by the Secretary of War under authority vested in him by Congress. Piers have been laid out under an authorized plan and built by the City within the street lines of Thirty-ninth, Fortieth and Forty-first Streets, which extend into the river beyond the bulkhead line. Permits and leases to occupy and use the piers have been granted by the City to the other defendants herein who float vessels in the slips over the plaintiffs' lands. The City of New York claims the right to dredge such lands for the purposes of harbor improvement. They rest such right on the contention that the lands under water are navigable and cannot lawfully be obstructed by plaintiffs. The plaintiffs contend



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that the land under water between the bulkhead line and their westerly line was granted in fee simple absolute and for beneficial enjoyment; that no public right or navigation remained over the lands thus conveyed.

The question is to what extent has the state by its grants extinguished the *jus publicum* over such lands.

At Special Term the City of New York was enjoined from dredging the lands of plaintiffs. The Appellate Division modified this judgment by permitting the City to dredge the lands *west of the bulkhead line* established by the Secretary of War.

The City appeals because it claims the right to dredge any portion of plaintiffs' lands between the piers. The plaintiffs appeal on the ground that they are entitled to the relief demanded in the complaint.

The state holds the title in fee to lands under water as sovereign for the public, subject to the right of the people to use the river as a water highway. The grant of the lands to the City in 1807 was for the purpose of enabling the City to regulate and construct slips, wharves and piers. The City sold the lands for the purpose of enabling the grantees to fill and use the land for the extension of streets thereon and the erection of wharves, piers, etc.

The grant was, therefore, not absolute and unqualified, but was subject to the rights of the public. (*American Ice Co. v. City of New York*, 217 N. Y. 402, 405, 406.) The City could not exclude the public from the use of navigable waters and it could not grant the right to exclude the public from such use so long as the waters

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remained navigable. It scarcely needs assertion that it could not destroy the navigability of the Hudson by making exclusive private grants. It could convey submerged lands along the shore to promote commerce, not to destroy it.

When the Secretary of War established the bulkhead line, the title of the State, the City and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it. (*Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82.) Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The City of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs.

But the United States acts as sovereign and the State of New York acts also as proprietor. The authority of the State in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery v. Portland*, 190 U. S. 89; *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It had, however, granted all its title to the premises to the City of New York. The City might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips.

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If plaintiffs' lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the State (*First Construction Co. v. State*, 221 N. Y. 295), but so long as they remained under water they were subject to the sovereign power of the State to regulate their use for purposes of navigation. The state has delegated such power to the City. The City may not, however, as the successor to the title of the State, convey lands under waters to private owners and retake the same by the exercise of the police power without making compensation therefor. (*Penn. Coal Co. v. Mahon*, 260 U. S. 343; 43 Supp. Ct. Rep. 158.) A distinction is taken between the mere ownership of the soil under water and the control of it for public purposes (*People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71).

Great cities have been built up by grants of land under water. The City of New York has been similarly developed by extending it over submerged lands. The promotion of the commercial prosperity of the port has been one purpose of such grants. But no case holds that any substantial interference with navigation may thus be authorized. Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is dictum (*People v. Steeplechase Park Co.*, 218 N. Y. 459; *Langdon v. Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of

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lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes. (*Town of Brookhaven v. Smith*, 188 N. Y. 74; *Barnes v. Midland R. R. Terminal Co.*, 193 N. Y. 378). The lands in question remain under the public waters of the State and so long as they remain such, the right to control navigation over them remains in the State to be exercised in the public interest. (*Matter of Long Sault Development Co.*, 212 N. Y. 1; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 453.) The State has succeeded to the *jus publicum* of the English crown and not to the *jus privatum* (*Town of Brookhaven v. Smith*, *supra*), notwithstanding much unnecessary discussion of the latter doctrine. The *jus privatum* in any event is at all times subject to the *jus publicum*. (*Tiffany v. Town of Oyster Bay*, 234 N. Y. 15.) The right of the grantee to fill in his land under water with solid filling (*Durgen v. Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. But such grant having once been made, titles traced back to the State as proprietor may not be divested by such regulations, without compensation.

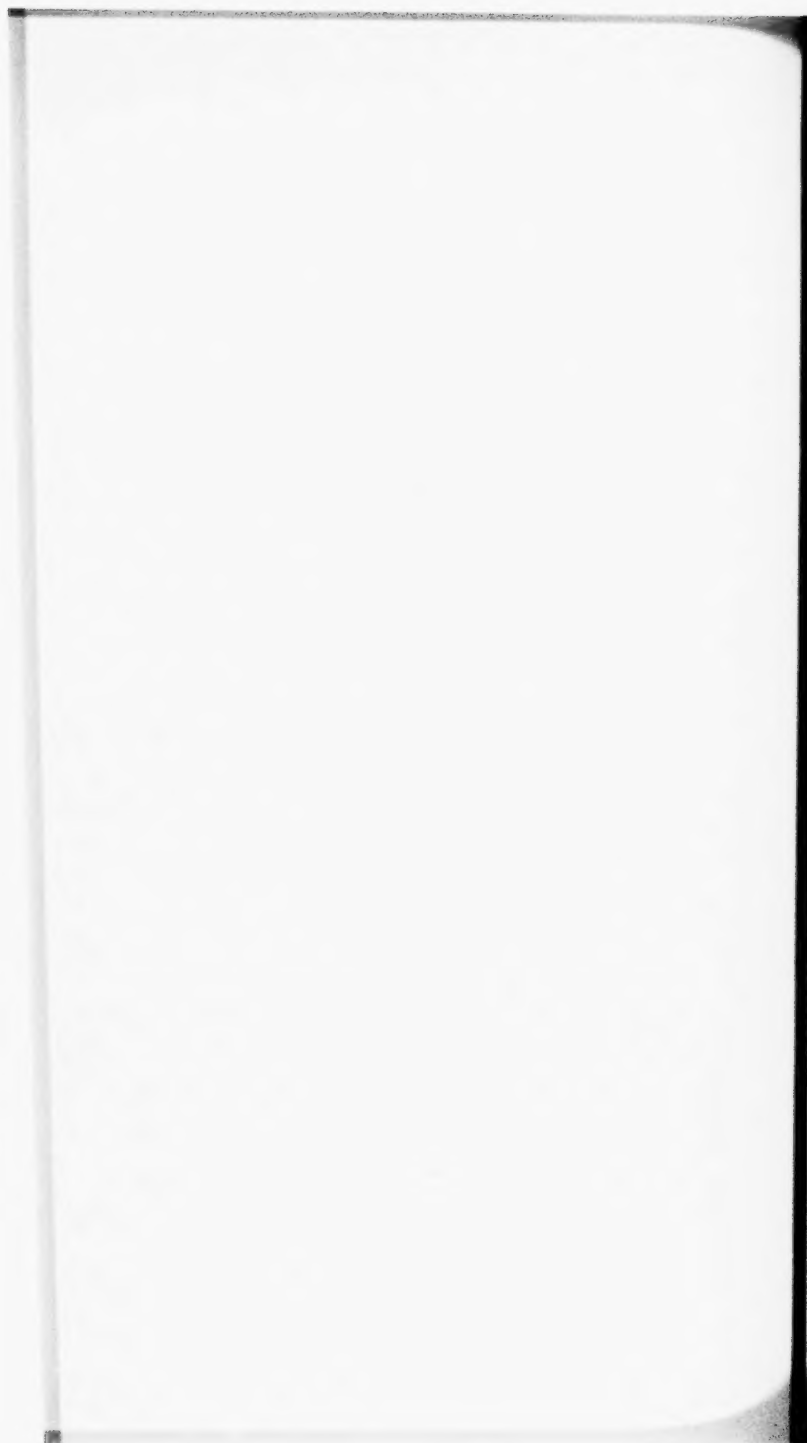
*Opinion of Court of Appeals.*

The grant to plaintiffs being a property right which can be resumed by the City only on payment of compensation, was a grant of all the title the City had to convey. The right of the public was not thereby extinguished. The City had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the City in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the City to convey to private owners.

The judgment should be affirmed, without costs.

HISCOCK, *Ch. J.*, HOGAN, CARDOZO, McLAUGHLIN, CRANE and ANDREWS, *J.J.*, concur.

Judgment affirmed, etc.



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IN THE  
**Supreme Court of the United States,**

October Term, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as executors, etc.,  
*Plaintiffs in Error,*

—against—

THE CITY OF NEW YORK, *et al.*,  
*Defendants in Error.*

No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
*Plaintiffs in Error,*

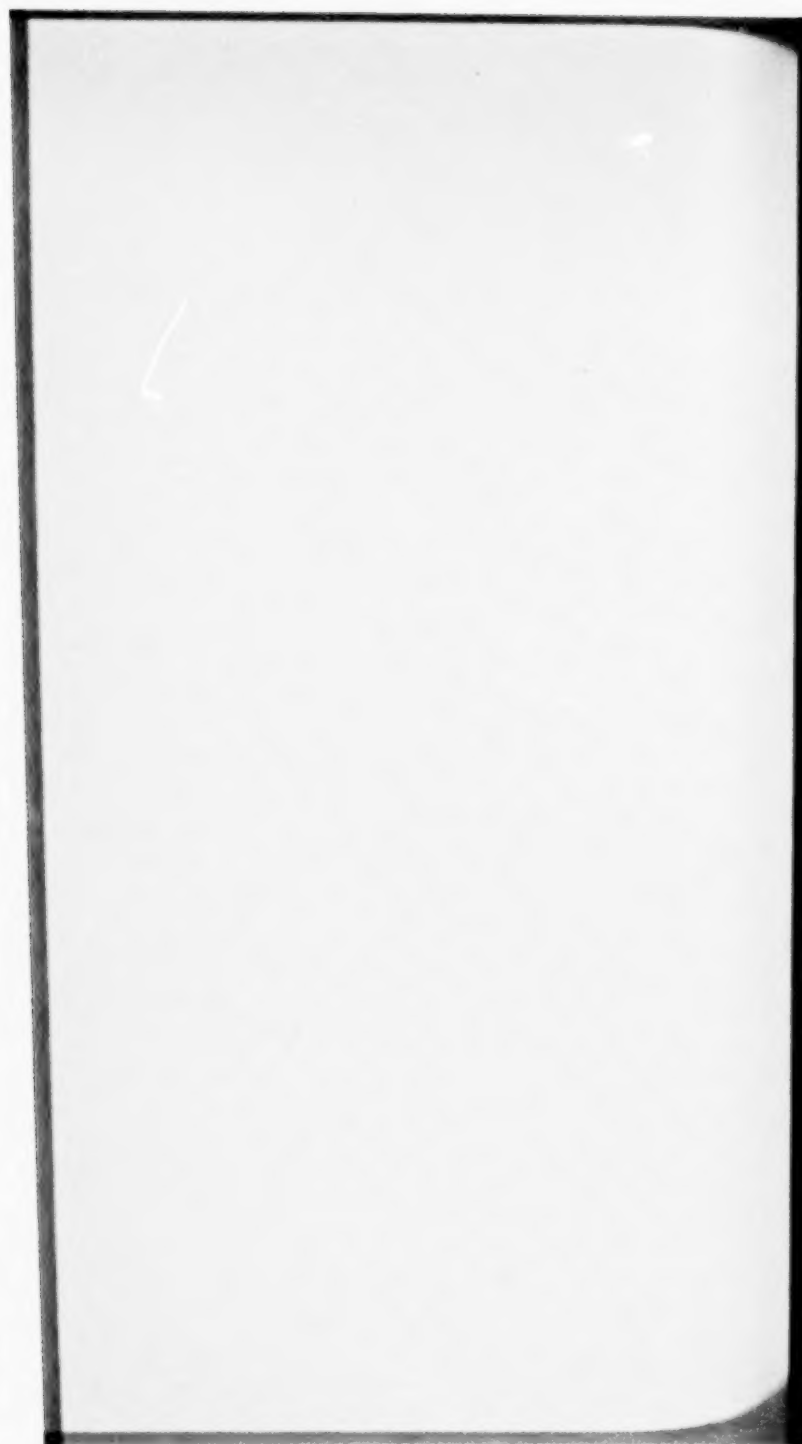
—against—

JOHN T. DELANEY, as Commissioner of Docks of the  
City of New York,  
*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE  
OF NEW YORK.

**BRIEF FOR PLAINTIFFS IN ERROR.**

CHARLES E. HUGHES,  
BANTON MOORE,  
*Of Counsel.*





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IN THE  
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October Term, 1925.

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EDGAR S. APPLEBY and JOHN S.  
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*Plaintiffs in Error,*

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No. 16

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JOHN T. DELANEY, as Commissioner  
of Docks of the City of New York,

*Defendant in Error.*

---

*In Error to the Supreme Court of the State of  
New York.*

**BRIEF FOR PLAINTIFFS IN ERROR.**

With the permission of the Court we shall argue these two cases together and discuss the points they present in this brief.

The two cases involve the same fundamental ques-

tions. They relate to the same property and arise under the same grants. The differences are procedural rather than substantial, and it will avoid repetition to discuss the questions applicable to both cases in a single brief.

### ***Statement.***

These are writs of error to review judgments of the Supreme Court of the State of New York, which have been affirmed by the Court of Appeals of the State, records remaining in the Supreme Court (*Appleby v. City of New York*, 199 App. Div. 539; 235 N. Y. 351; *The Matter of Appleby v. Delaney*, 199 App. Div. 552, 235 N. Y. 364). There are also petitions for writs of *certiorari*, which are held pending the hearing upon the writs of error.

The plaintiffs in error (plaintiffs below) are grantees of the City of New York. The property granted consists of water lots on the west side of the City of New York to be made land or gained out of the Hudson or North River between 39th and 41st Streets and Twelfth and Thirteenth Avenues. There are two grants—one made on August 1, 1853, to the plaintiffs' ancestor and testator, Charles E. Appleby, of the land under water between 39th and 40th Streets and the other made on December 24, 1852, of the land under water between 40th and 41st Streets. The premises covered by the two grants embraced the land under water from the original line of high water between Eleventh and Twelfth Avenues to the westerly side of Thirteenth Avenue. The portions within the streets and avenues, that is within 39th, 40th and 41st Streets and Twelfth and Thirteenth Avenues excepted for public streets.

*No. 15*

In No. 15, *Appleby v. The City of New York*, the suit was brought in 1914 to restrain the defendant, The City of New York and its co-defendants, the City's lessees, from violating the rights of property claimed under these grants (*Record*, No. 15, Amended Complaint, pp. 9-60). The point of this suit was that while the City had granted absolute title in fee simple to the land in question with right to fill in and improve the same and to enjoy the easements appurtenant thereto, and also with the wharfage, cranage, advantages and emoluments accruing by or from that portion of the exterior line of the City lying on the westerly side of the granted premises fronting on the Hudson River, the City had undertaken without condemning plaintiffs' property and easements and paying just compensation therefor to appropriate them to its own use, by restricting plaintiffs' enjoyment, by building piers and structures which it leased to its lessees with the privilege of floating, mooring and docking boats over the plaintiffs' premises, using the plaintiffs' premises as slips or basins for itself and its lessees, and by otherwise violating the plaintiffs' rights.

The plaintiffs raised Federal questions under the contract clause (Article I, Section 10) and the due process clause (Fourteenth Amendment) of the Federal Constitution, insisting that the legislation invoked by the City if effect were given to it as against plaintiffs' rights of property violated these constitutional provisions (*Record*, No. 15, pp. 149-150).

The legislative situation was in brief as follows: After the grants in question, the State, by Laws of 1857, Chapter 763, undertook to fix the bulkhead line or line

of solid filling, in this vicinity, at 100 feet westerly of the westerly side of Twelfth Avenue by the confirmation of the Harbor Commissioners' map so showing it. By the same Act it was provided that no pier should be erected within 100 feet of another pier. By Laws of 1871, Chapter 574, the Department of Docks of the City of New York was created and the Board of Commissioners of Docks was directed to cause a plan for the development of the waterfront of the City to be prepared. Special authorization was given for the purchase or condemnation of property which might be taken in pursuance of the plan. The Commissioners adopted a plan for a new bulkhead line 50 feet west of the bulkhead line of 1857, that is, 150 feet westerly of the westerly side of Twelfth Avenue, and a pierhead line 500 feet westerly of the bulkhead line, and indicated on the plan where and how piers might be built. That plan was accepted by the Commissioners of the Sinking Fund.

In 1890, the Secretary of War approved the bulkhead and pierhead lines (of 1871) as recommended by the New York Harbor Line Board, and in 1897 he modified and re-established the pierhead line 700 feet westerly of the bulkhead line, upon similar recommendation of the New York Harbor Line Board. The Secretary of War did not adopt the pier plan of the City, but his map states (see original of Deft's. Ex. C, p. 529) that open pile structures could be built within the Secretary of War's pierhead line. There was thus a considerable portion of the plaintiffs' premises which they were entitled to fill in up to the bulkhead line of 1871, coincident with the Secretary of War's bulkhead line. And the Secretary of War's pierhead line was far outside beyond the limit of the plaintiffs' grant, that is be-



yond the originally projected Thirteenth Avenue. The State act of 1857 (above mentioned), however, provided that no pier should be erected within 100 feet of another pier and under the plan adopted in 1871 the City having erected piers in 39th, 40th and 41st Streets, and having leased exclusive pier privileges to their lessees, the plaintiffs were prevented from erecting any pier, wharf, or other structure upon their premises between the bulkhead line established by the Secretary of War and Thirteenth Avenue as originally laid down and described in the grants. It follows that this legislation, if effect be given to it, operates to deprive the plaintiffs of all rights under their grants beyond the bulkhead line.

After the trial of this suit (No. 15), but before the decision, the Commissioner of Docks proposed a plan amending the plan for waterfront improvements in the *locus in quo* by moving the bulkhead line inshore 100 feet, which placed it 50 feet west of the westerly line of Twelfth Avenue. This made a new bulkhead line 100 feet inside of the line of 1871 and the Secretary of War's line of 1890. This amendatory plan was approved by the Sinking Fund Commissioners in June, 1916, and under the applicable act of the State this action of the Commissioner of Docks and the Sinking Fund Commissioners constituted legislative action establishing a new rule for the limit of bulkhead and solid filling (Greater New York Charter, Secs. 817 *et seq.*). It is obvious that if effect were given to this legislation the plaintiffs' grants would be further impaired to the extent of a strip 100 feet wide across their entire premises. The construction of the Federal statutes under which the Secretary of War had fixed bulkhead and pierhead lines and the scope of his authority and effect of his action in so doing were also brought into question (*id.*, pp. 149-150).

The Decision in this suit (No. 15) set forth findings of facts and conclusions of law (*id.*, pp. 171-199) on which judgment was entered in July, 1917 (*id.*, pp. 201-203). The judgment gave an injunction against the City and those claiming under it restraining and compelling certain acts, but was not as broad as the plaintiffs had demanded. Cross appeals were then taken to the Appellate Division of the Supreme Court where order and judgment was entered on January 20, 1922. This affirmed the findings of facts of the trial Court, but modified certain conclusions of law and the injunction which had been granted, and as thus modified affirmed the judgment below (*id.*, pp. 549-591). On this order and judgment of the Appellate Division judgment of modification was entered on March 22, 1922 (*id.*, pp. 551-552). Appeal was then taken to the Court of Appeals where the judgment of the Appellate Division was affirmed and on *remittitur* this judgment was made the judgment of the Supreme Court (*id.*, pp. a, b, c).

The judgment in review is thus the judgment of the Appellate Division adopted by the Court of Appeals. This judgment maintains the plaintiffs' title; it explicitly determines that the legislature of the State had extinguished the *jus publicum* in the lands granted and that such grants are irrevocable and inviolate; that the plaintiffs had the right to fill in and make dry land at their pleasure and without the consent of the City of New York of so much of said premises as lay between the westerly side of Twelfth Avenue and the bulkhead line established by the Secretary of War in 1890. It was also held that the grants in question had been made for a valuable consideration and were valid contracts which could not be impaired by subsequent legis-

lation of the State without compensation. But the Court then proceeded to sustain such subsequent legislation with respect to the granted premises beyond in impairment of the grants (*id.*, pp. 550-551). The Court modified the injunction granted by the trial Court so far as it enjoined the excavation, dredging or removing of the soil of plaintiffs' premises westerly of the said bulkhead line (*id.*, p. 549) and also held that the plaintiffs were not entitled to an injunction restraining the City from using or authorizing the use by others of the plaintiffs' premises either within or without said bulkhead line for the purpose of mooring, docking and floating boats (*id.*, p. 551).

#### No. 16

As it was held in the suit above described (No. 15) following earlier decisions of the State court that under the grants in question the plaintiffs had the right to fill in and improve their premises out to the bulkhead line, the plaintiffs in December, 1919, made an application to the Commissioner of Docks for permission to fill in and improve the premises in the manner described in plans submitted. The reason for this application was that the plaintiffs had been compelled to pay approximately \$74,000 taxes and desired to improve their property (*Record*, No. 15, Stipulation, p. 200). While they had a clear right to fill in up to the bulkhead line, the City, of course, had the power of reasonable police supervision as they have with respect to all property within its limits, and it was necessary to obtain the usual permits under which the work which the petitioners were entitled to do might proceed in consonance with appropriate municipal regulations (*Record*, No. 16, pp. 24-34). The

Commissioner of Docks denied the application, but not upon the ground that the plans were defective in any particulars to which the supervisory power of the City might be properly directed, but solely upon the ground that the proposed construction was not in accordance with the "new plan" of 1916 (*id.*, p. 35). This new plan was the plan which the Commissioner of Docks had proposed and the Sinking Fund Commissioners had approved for moving the bulkhead line in 100 feet of the line of 1871 and the Secretary of War's line of 1890. The plaintiffs then presented to the Supreme Court their application for a peremptory writ of *mandamus* to compel the Commissioner of Docks to grant the permit (*id.*, p. 34). The petitioners showed that if effect was given to this new plan it would impair the obligation of the contracts contained in their grats and deprive them of their property in violation of their rights under the applicable provisions of the Federal Constitution (*id.*, pp. 10-11). The City answered the petition, according to the practice in the State court, by the affidavit of the Commissioner of Docks in opposition to the petition. His opposition was solely upon the ground that the application of the petitioners called for the construction of substantial structure and solid filling outside of the bulkhead line of the "new plan" which had been adopted in 1916, and therefore he was "without power to grant the application" (*id.*, p. 65). The Supreme Court at Special Term thereupon denied the application, the denial being stated in the order of the Court to be "as a matter of right and not in exercise of discretion." The opinion of the Court said that the grants by the City had been made upon condition that permission should be obtained from the City before structures could be erected.

and as they did not have permission they could not erect (*id.*, p. 66).

Appeal was then taken to the Appellate Division of the Supreme Court which held that view to be erroneous and reversed the order and granted the *mandamus*, but it was provided that the writ should not issue for thirty days in order to allow appropriate condemnation proceedings to be instituted to acquire the property and property rights of the relator (*id.*, p. 74). The Court held that the bulkhead line as established in 1916, which crossed the premises granted by the original grants, did not limit the rights of the plaintiffs and that these were restricted only by the bulkhead line approved by the Secretary of War. The Court ruled that the plaintiffs had an absolute right to fill in up to the bulkhead line. The Court pointed out that no objection had been made by the Commissioner of Docks to the alternative plan presented for the improvement, and that he should issue a permit based upon one of the other proposed plans, and that if he should deem it necessary that the bulkhead and wharves should be built on the bulkhead line established in 1916 the City should be afforded an opportunity to acquire the property on paying for it (*id.*, p. 74). The order of the Appellate Division was entered accordingly on April 27, 1922 (*id.*, pp. 69-70).

Appeal was then taken to the Court of Appeals where this order was reversed and the order of the Special Term affirmed (*id.*, pp. *a, b, c*). The Federal questions were duly urged throughout the proceedings.

This decision of the Court of Appeals undoubtedly gave effect to the pier plan of 1871 and the new bulkhead plan of 1916. This was legislative action attempting to establish a rule as to bulkheads and fillings under

authority of the legislature. The new plan was manifestly in derogation of plaintiffs' rights of property and impaired the obligations of their contracts. This new plan as has been said was the only ground stated in the answer in the Commissioner of Docks' affidavit.

The Court of Appeals in its opinion referred to a section of the Sinking Fund ordinance of 1844 which provided that no grant made by virtue of the ordinance should authorize the grantee to construct bulkheads or piers or make land in conformity therewith without the permission of the common council, but the Court of Appeals had held (in No. 15) and the law of the case between these plaintiffs and the City was thereby established, that the plaintiffs had the absolute right to fill in up to the bulkhead line of 1890 as laid down by the Secretary of War, and that this could be done by them "at their pleasure and without the consent of the City of New York" (*Record*, No. 15, p. 550). This was in the order and judgment which the Court of Appeals affirmed in that case. If the ordinance of 1844 could be deemed to have any effect, in the light of the rights of the plaintiffs under their grants as finally established, it could only refer to the reasonable police supervision of the City and the permission which should be obtained for that purpose and which in a proper case the City was bound to give; certainly not to a permission which it could withhold in the interest of a plan destructive of the plaintiffs' rights of property.

The Court of Appeals also in its opinion referred to a covenant in the grants that the grantees would not build the wharves, bulkheads, avenues or streets mentioned in the grants or make the lands in conformity with the covenants in the grants until permission should

be had from the City, and would not build any wharf, pier or other obstruction without the permission of the City. Grants of this sort and with this provision had frequently come before the courts for construction. These grants contained covenants of the grantees to make the lands within the limits of the streets and avenues at the request of the City. The Court of Appeals had held that the covenant not to build or make land etc. above quoted, only applied to the land within the limits of the streets and avenues and not to the lands granted to the grantees (*Duryea v. Mayor*, 62 N. Y. 592, 596, 597; *Duryea v. Mayor*, 96 N. Y. 477, 496; *Mayor v. Law*, 125 N. Y. 380, 391). This was the construction specifically placed upon the grants by the judgment in No. 15. For in the decision in that case it was expressly found as a conclusion of law that the covenant by the grantee that it would not build the wharves, bulkheads, avenues or streets or make the lands in conformity with the covenants mentioned until permission should be obtained from the City "relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues" (*Record*, No. 15, par. (14), p. 197). It was also there held expressly that the covenant by the grantee that he would not build or erect or cause to be built or erected any wharf, pier or any other obstruction in the Hudson River in front of the granted premises without the permission of the City refers only to the land under water "in front of the plaintiffs' premises" and that there was no such covenant as to the granted premises between the streets and avenues (*id.*, par. (15), pp. 197, 198). These conclusions of law were expressly affirmed in the order and judgment of the Appellate Division in No. 15 (*id.*, p. 551),

and this judgment was affirmed without modification by the Court of Appeals (*id.*, *b*). In the case therefore in which the rights of the plaintiffs under their grants were put in issue and decided it was finally and expressly adjudged that the covenant mentioned by the Court of Appeals requiring permission of the City did not apply to the premises granted to the plaintiff.

The decision of the Court of Appeals in No. 16 reversing the order of the Appellate Division and affirming the order of the Special Term denying the petition for *mandamus* simply gives effect to the "new plan" set up under the Act of 1916 which has been held in No. 15 should not be given effect because of the right of the plaintiffs to fill in out to the Secretary of War's line.

The result of the two cases is that the plaintiffs' contract rights and property rights protected by the Federal Constitution have not been recognized by the judgment in No. 15 to the extent to which the plaintiffs are entitled, and by the judgment in No. 16, under which the City in the interests of its "new plan" can arbitrarily refuse permission to the plaintiffs to exercise their rights under their grants, plaintiffs' contract rights and property rights are wholly destroyed. They own property and have paid large taxes upon property which they cannot use in any way.

## FACTS.

Having made this preliminary survey, we proceed to a more detailed statement of the facts.

The Hudson River bounds the westerly shore of Manhattan Island in New York City. Its shore lines were originally irregular, with mud flats and indentations be-



tween the upland and the deep water channel or navigable portion of the stream. As usual, where large cities border on tidal waters, it became essential for the public benefit to establish a permanent and regular *ripa* where access could be had from upland to river, by defining the channel, and providing for the erection of a bulkhead and the filling in of the waste lands not needed for navigation.

This was done by the legislature of New York in Chapter 182 of the Laws of 1837. This act established the permanent *ripa* and exterior avenue (Thirteenth Avenue) along the Hudson River as shown on the map of George P. Smith (*Record*, No. 15, Plaintiffs' Ex. 1, p. 365). The Act extended and established the City streets and avenues out to the *ripa*. It vested the City of New York with "all the right and title of the people of this State" to the lands then under water. And it provided that adjacent owners should have the pre-emptive right to grants from the City. In view of the importance of this act, it is quoted in full as follows:

"§1. The Thirteenth Avenue, as laid out on a map made by George B. Smith, city surveyor, bearing date March tenth, eighteen hundred and thirty-seven, and approved by the mayor, aldermen and commonalty of the city of New-York, by a resolution passed in common council, on the twenty-eighth day of March, eighteen hundred and thirty-seven (which map is filed in the office of the street commissioner of the city of New-York), shall be the permanent exterior street or avenue in the said city along the easterly shore of the North or Hudson's river, between the southerly line of Hammond-street, and the northerly line of One hundred and Thirty-fifth-street.

§2. The several streets of the said city as laid out on the map or plan made by the commissioners appointed by the act entitled 'An act relative to improvements touching the laying out of streets and roads in the city of New-York, and for other purposes,' passed April 3d, 1807, or as subsequently established by law, southerly of and including One hundred and Thirty-fifth-street, shall be continued and extended westerly along the present lines thereof, from their present terminations, on the said map or plan, respectively, to the said Thirteenth Avenue. Also, the Eleventh Avenue shall be continued and extended, on the said map or plan, along the present line thereof from its present southerly termination, at or near Thirty-third-street, to Nineteenth-street; and the Twelfth Avenue shall be continued and extended on the said map or plan, along the present line thereof, from Thirty-sixth-street to One hundred and Thirty-fifth-street.

§3. The mayor, aldermen and commonalty of the city of New-York shall be, and they are hereby, vested with all the right and title of the people of this state, to the lands covered with water along the easterly shore of the North or Hudson's river, between Hammond-street and One hundred and Thirty-fifth-street, and extending from the westerly side of the lands under water, heretofore granted to the said mayor, aldermen and commonalty of the city of New-York, by letters patent, in pursuance of the act entitled 'An act relative to improvements in the city of New-York,' passed February 25th, 1826, to the westerly side of the said Thirteenth Avenue. And the said letters patent shall be construed so as to grant to the

said mayor, aldermen and commonalty of the city of New-York, and their successors forever, the said lands under water easterly of the westerly line of the said Thirteenth Avenue.

§4. The proprietors of all grants of land under water, or of water lots, heretofore made by the said mayor, aldermen and commonalty of the city of New-York, on the easterly shore of the North or Hudson's river, shall have the pre-emptive right in all grants to be made by the said mayor, aldermen and commonalty of the city of New-York, of any lands under water, granted to them by this act, adjacent to and in front of the said lands under water so heretofore granted; and the proprietors of land having a pre-emptive right to grants of land under water, by virtue of the said act entitled 'An act relative to improvements in the city of New-York,' passed February 25th, 1826, shall have the same pre-emptive right in all grants made by the said mayor, aldermen and commonalty of the city of New-York, of any lands under water granted to them by this act."

The grants to the plaintiffs' predecessors in title (Charles E. Appleby and Robert Latou) were made on August 1, 1853, and December 24, 1852, respectively (*id.*, Plaintiffs' Exs. 4, 5, pp. 367-387). The grants were made upon valuable and substantial considerations (\$11,306.87). The premises granted are shown in pink on the maps which form part of the grants (*id.*, pp. 369, 379). The Appleby grant (Ex. 4) ran from the center line of Thirty-ninth Street to the center line of Fortieth Street and from the original line of high water out to the exterior line or westerly side of Thirteenth Avenue.

The Latou grant ran from the center of Fortieth Street to the center of Forty-first Street and from the original line of high water out to the said exterior line. In each grant the portions of the premises lying within Thirty-ninth and Fortieth Streets and Twelfth and Thirteenth Avenues were excepted for public streets. The grant was in each case of

"All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded," etc.

\* \* \* \* \*

"Together with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining."

The grants were in fee simple. The grantees respectively covenanted that they would, upon the request of the City, build bulkheads, wharves, streets and avenues to form part of Twelfth and Thirteenth Avenues and Thirty-ninth, Fortieth and Forty-first Streets as excepted, and that they would keep these in repair. No request has ever been made that the grantees should build under this covenant. It was also provided in the grant that the said streets and avenues should ever remain public streets and avenues for free and common use. The grantees agreed to pay taxes. There was also a covenant, which, as the Court found, only applied to the excepted portions within the streets and avenues that the grantees would not build the wharves, bulkheads, avenues or streets mentioned in the preceding covenant until permission had been obtained from the City. It was also covenanted that the grantees would not build any wharf or pier in the Hudson River in front

of the granted premises without permission of the City, and this the Court has found only related to the erection of structures westerly beyond the line of and in front of the granted premises, that is, beyond the line of Thirteenth Avenue (*id.*, Decision, pp. 197, 198).

The City covenanted that the grantees respectively

"shall and lawfully may from time to time and at all times hereafter fully have, and enjoy, take and receive and hold to his own proper use, all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City, lying on the Westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever."

"Excepting therefrom such wharfage, cranage, advantages and emoluments to grow or accrue from the Westerly end of the bulkhead in front of the entire width of the Northerly half part of Thirty-ninth Street and the Southerly half part of Fortieth Street, which shall be and are hereby reserved for the said parties of the first part, their successors and assigns, with full power to collect and receive the same for their own proper use and benefit forever"

(*id.*, Ex. 4, p. 374, Ex. 5, p. 385).

By Laws of 1857, Chapter 763, the State attempted by adopting the Harbor Commissioners' map to establish a bulkhead line 100 feet west of Twelfth Avenue. This line was considerably in-shore of the line established by the Act of 1837 and to which the grants in question extended. Thus, it will be observed that from the maps

forming part of these grants (*id.*, pp. 369, 379) the distance between the westerly side of Twelfth Avenue and the easterly side of Thirteenth Avenue as laid down was from 363 feet at Thirty-ninth Street to 400 feet at Forty-first Street. The Act of 1857 prohibited any solid filling beyond the bulkhead line which it attempted to establish and also prohibited the building of any structure exterior to the said bulkhead line at the *locus in quo*, except piers which should not exceed 70 feet in width, respectively, with intervening water spaces of at least 100 feet. This provision was as follows (Laws of 1857, Chapter 763, Sec. 2) :

"It shall not be lawful to fill in with earth, stone, or other solid material in the waters of said port, beyond the bulkhead line or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of this act, and piers which shall not exceed seventy feet in width respectively, with intervening water spaces of at least one hundred feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond, or outside of the said sea wall."

Chapter 574 of the Laws of 1871 established a Department of Docks of the City of New York which was authorized to adopt a new plan for improving lands under water, wharves, bulkheads, etc. Section 6 of this Act, amending Section 99 of the Act of April 5, 1870, relating to the government of the City of New York provided as follows:

"3. Said board of the said department of docks shall meet and examine the plans prepared

under their direction, from time to time, and shall, on or before the first day of May, eighteen hundred and seventy-one, determine upon any one of said plans for the whole or any part of said water-front, or may, in its discretion, cause a new plan to be made combining the separate features of any two or more plans, and determine upon such new plan. And said board shall, when it has determined upon any plan or plans for the whole or any part of said water-front, send such plan or plans so determined upon, together with all documents, specifications, estimates and particulars relating thereto, to the commissioners of the sinking fund, who may adopt or reject any such plan or plans. If any such plan is rejected by said commissioners of the sinking fund, the said board shall send another plan in place thereof to said commissioners. The plan or plans adopted by said commissioners of the sinking fund shall be returned by them to the said board, with a certificate of such adoption written thereon, which certificate shall specify the territory or district which said plan shall cover and control, and said plan and certificate shall be filed in the office of said board, and be open to public inspection, and shall, from the time of such adoption, be the sole plan according to which any wharf, pier, bulkhead, basin, dock or slip, or any wharf, structure or superstructure shall thereafter be laid out or constructed within the territory or district embraced in and specified upon such plan, and be the sole plan and authority for solid filling in the water surrounding said city and for extending piers into said waters, and erecting bulkheads around said city; and all other provisions of law

regulating solid filling and pier and bulkhead lines in said waters are to be deemed to be repealed upon the filing of said plan, if said plan be inconsistent with such provisions of law. And said board shall give notice by advertisement for six weeks of the adoption of such plan. From the time of the adoption of said plan no wharf, pier, bulkhead, basin, dock, slip, or any wharf, structure or superstructure shall be laid out, built or rebuilt within such territory or district except in accordance with such plan."

Under this Act the Board of Commissioners of the Department of Docks adopted a plan for a new bulkhead line westerly of the westerly line of Twelfth Avenue, which was 50 feet west of the bulkhead line of 1857, that is, it was 150 feet west of the westerly side of Twelfth Avenue and parallel therewith. The Board of Commissioners also adopted a pierhead line 500 feet westerly from and parallel with the bulkhead line. This plan was subsequently amended by the fixing of a pierhead line 200 feet further westerly, that is, 700 feet west of the proposed bulkhead line. This plan of 1871 provides that that portion of plaintiffs' premises between Twelfth Avenue and a line 150 feet westerly therefrom should be acquired by the City as a part of a marginal wharf, way or place, and that the remaining portion of plaintiffs' premises should be acquired for bulkheads and docks, slips or basins appurtenant to the piers which were to be erected, under the pier plan of 1871, in Thirty-ninth, Fortieth and Forty-first Streets (*Record*, No. 15, Decision, p. 178). The Act of 1871 authorized the Department of Docks to acquire for the City any and all property to which the City did not have title and any rights



and easements pertaining thereto. The provision is as follows:

"4. The said board of the department of docks is hereby authorized to acquire in the name and for the benefit of the corporation of the city of New York any and all wharf property in said city to which the corporation of the city of New York then has no right or title, and any rights, terms, easements and privileges pertaining to any wharf property in said city and not owned by said corporation; and said board may acquire the same either by purchase or by process of law, as herein provided. Said board may agree with the owners of any such property, rights, terms, easements or privileges, upon a price for the same, and shall certify such agreement to the commissioners of the sinking fund, and if said commissioners approve such agreement, said board shall take from such owners, at such price, the necessary conveyances and covenants for vesting said property, rights, terms, easements or privileges in, and assuring the same to, the mayor, aldermen and commonalty of the city of New York forever, and said owners shall be paid such price from the city treasury, as hereinafter provided. If the said board shall deem it proper that the said corporation should acquire possession of any such wharf property, rights, terms, easements or privileges for which no price can be agreed upon between the owners thereof and the said board, the said board may direct the counsel to the corporation of said city to take legal proceedings to acquire the same for the mayor, aldermen and commonalty of said city; and the said counsel to the corporation shall take the same proceedings to acquire the same as

are by law provided for the taking of private property in said city for public streets or places, and the provisions of law relating to the taking of private property for public streets or places in said city are hereby made applicable, as far as may be necessary, to the acquiring of the said property, rights, terms, easements and privileges, and said board is also empowered to acquire in like manner the title to such lands under water and uplands as shall seem to said board necessary to be taken for the improvement of the waterfront." *Laws of 1871, ch. 574, Sec. 6*, amending Sec. 99 of April 5, 1870 relating to the government of the City of New York.

In 1890, the Secretary of War pursuant to Act of Congress established a bulkhead line which ran at the *locus in quo* 150 feet west of Twelfth Avenue and parallel therewith and in 1897 he also re-established a pierhead line 700 feet west of and parallel with the bulkhead line. Thus the bulkhead line passed through plaintiffs' property and the pierhead line lay far beyond it. The Secretary of War did not establish, however, any pier plan, and the pier plan of the City under the Act of 1871 was neither adopted nor sanctioned by the Secretary of War. So far as the Secretary of War's pierhead line was concerned, there was no interdiction of pier or wharf structures, provided they did not extend beyond his line. This appears clearly from the statement which appears on the original of the Secretary of War's map (Defendants' Ex. C) as follows:

"The bulkhead line defines the limit for solid filling; the pierhead line, the limit to which open piled structures may be built" (*Record*, No. 15, p. 571).

This statement is not found upon the extract in the record (*id.*, p. 529), but will be shown on the duplicate of original which we shall produce upon the argument.

In 1894, as contemplated by the Act of 1871, the City began condemnation proceedings to acquire the plaintiffs' rights and title to the premises in question and commissioners were appointed for that purpose (*id.*, Exs. 12a-15, pp. 397-417). This proceeding dragged along until 1914, when the City discontinued it. Meanwhile, the City erected pier approaches in the streets and built piers which were permanent structures within the lines of Thirty-ninth, Fortieth and Forty-first Streets. Piers were shedded and fences and gates erected, so as to adapt the piers to the exclusive use of the City's lessees and the City leased the piers for such exclusive use upon rentals fixed accordingly which the City has taken to its own use. A number of these leases are described in the amended complaint and admitted in the answer. For example, there is the lease from the City to the New York Horse Manure Transportation Company of March, 1912, for a term of five years with permission to maintain a dumping board with the necessary runways, scale houses and tool houses for workmen upon, over and adjoining the wharf property demised. The rental was four equal quarterly payments of \$3,300 each and the lessees covenanted to do such dredging as the City might require in the basin or slips adjoining the premises (*id.*, Ex. 48, p. 468; see also the lease to Burns Bros., Ex. 49, p. 470, to the New York Stock Yards Company, Ex. 50, p. 472, to Central Railroad Company of New Jersey, Ex. 51, 52, 53, pp. 474-476, to Consolidated Gas Company, Ex. 54, p. 477, to Eben E. Olcott, Ex. 55, p. 478). The description of the leases and the rentals received are shown on the rent rolls (Exs. 72-80, pp. 479-487). It

was manifest that these piers were designed and leased to be used in connection with the adjoining slips or basins on plaintiffs' premises and the lessees had the privilege of mooring and docking and loading and unloading vessels alongside their piers and over the plaintiffs' premises. In addition to this, the City and its lessees dredged out the plaintiffs' premises from time to time as they desired.

In short, the City despite the grants in question proceeded under the Acts of 1857 and 1871 to assert proprietary rights in and over the plaintiffs' premises and to appropriate these premises to its own use. In addition, not only were the plaintiffs prevented from building the streets and avenues adjoining the granted premises as contemplated in the grants, but instead of establishing (as provided in the grants) the extended Thirtieth, Fortieth and Forty-first Streets, and Twelfth and Thirteenth Avenues as public streets "for the free and common use and passage of the inhabitants of said City," these were extended for the exclusive use of the City and its lessees as proprietors. Thus the plaintiffs were deprived of the entire benefit of their property. Meanwhile they were compelled to pay taxes and the record shows that they paid upwards of \$74,000 in the satisfaction of tax liens enforced by the City (*id.*, Stipulation, p. 200; Decision, p. 194).

When the condemnation proceedings were discontinued this suit (No. 15) was brought to prevent the City, its representatives and lessees, from performing acts in derogation of plaintiffs' rights. The facts are not in dispute and are shown in the Decision (*id.*, pp. 171-195). These findings of fact were not disturbed on appeal and stand finally affirmed (*id.*, pp. c, 549-551).

The Conclusions of Law of the trial Court setting forth the nature and extent of the plaintiffs' property rights, were, however, modified by the Appellate Division and as modified were affirmed by the Court of Appeals (*id.*). As the order and judgment of the Appellate Division does not set forth the full text of these conclusions as modified, they are for the convenience of this Court set forth below together with the additional conclusions contained in the order and judgment of the Appellate Division (*id.*, Decision, pp. 195-199; Order and Judgment of Appellate Division, pp. 549-551):

*Conclusions as Modified:*

"(1) 1. That the State of New York has succeeded to all the rights of both the Crown and Parliament in the navigable waters and soil underneath them and was vested with the *jus privatum* or ownership of the soil, and the *jus publicum* or the dominion and control of the navigable waters.

(2) 2. That the Legislature of the State of New York, subject to the restriction imposed by the Federal Constitution, or the Constitution of this State, has the absolute and uncontrollable power to grant the navigable waters in this State, and the land underneath thereof.

(3) 6. By the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Charles E. Appleby and Robert Latou, set forth in the amended complaint, the grantees and their assigns, acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds, with the right to fill in and improve the same at their

pleasure, subject to the Federal Government's power to control.

(4) 8. Subject to the proper regulations of the State or the Federal authorities, the plaintiffs herein could fill in said premises or improve the same with wharves and piers.

(5) 9. The right to fill in or improve said premises as aforesaid, is a vested property right which can not be taken from the plaintiffs, without compensation, except by the paramount right of the Federal Government.

(6) 10. The deeds hereinbefore mentioned should be construed according to the intent of the parties.

(7) 11. The provisions of Chapter 182 of the Laws of 1837 were in full force and effect at the time of the deeds to Appleby and Latou, and said deeds were made and accepted with knowledge of and reliance upon the provisions and effect of said Act.

(8) 13. Easements of light, air and access in the streets and avenues shown on the maps annexed to the deeds to Appleby and Latou, passed upon the delivery of said deeds and are now owned and possessed by the plaintiffs herein to become effective whenever plaintiffs' lands are filled in.

(9) 14. The City of New York has no easement of access by boats over the plaintiffs' premises to the piers in 39th, 40th and 41st Streets between Twelfth and Thirteenth Avenues, and it has no right to dock or moor boats over plaintiffs' said premises, or to use said premises for slips or basins, appurtenant to said piers but until

filled in, the waters over plaintiffs' land are navigable waters subject to public use as such.

(10) 17. Chapter 763 of the Laws of 1857, and the Harbor Commissioner's map of 1857, are not effective as to plaintiffs. Said act and map do not affect the premises at the present time and have no bearing upon the plaintiffs' rights or title herein.

(11) 20. The Acts of Congress and the designation by the Secretary of War of bulkhead pier-head lines did not vest in the City of New York any right or title to the plaintiffs' premises and did not confer upon said city any easements or rights to use plaintiffs' premises for slips and basins, or for access to the piers in the streets.

(12) 25. The plaintiffs should have the costs of this action.

(13) 27. Either party to this action may move at the foot of the judgment for further direction as to the enforcement of the same.

(14) VII. The covenant by the grantee, that he, his heirs and assigns

'will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,'

relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

(15) VIII. The covenant by the grantee, that he, his heirs and assigns

'will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose.'

refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues.

(16) XXIII. The provisions of Chapter 763 of the Laws of 1857 have been repealed except so far as they have been incorporated in the subsequent consolidation acts and Charters (Chapter 410 of the Laws of 1882; Chapter 378 of the Laws of 1897 and Chapter 466 of the Laws of 1901) of the City of New York, in so far as it affects the plaintiffs' rights and title.

(17) I. That the title of the Mayor, Aldermen and Commonalty of the City of New York to the lands under water in the Hudson River adjacent to Manhattan Island were subject to the control and regulation of the State and Federal Governments for the purpose of commerce and navigation.

(18) II. That the grants to Robert Laton and Charles E. Appleby, set forth in Findings of Fact 35 and 37 were issued subject to such restriction.

(19) III. That by the establishment of the bulkhead line of 1871 by the City and the establishment of the bulkhead line by the Secretary of War in the year 1890 co-incident therewith, all of



the Hudson River westerly thereof was declared to be navigable waters of the State and of the United States, and all obstructions except piers to the free use thereof for the purposes of commerce and navigation were prohibited.

(20) V. That so much of the water of the Hudson River as lie easterly of the aforesaid bulkhead line of 1871 and westerly of the easterly side of Twelfth Avenue are open and in use for purposes of commerce and navigation and no action to restrain or prevent the free use of the same by vessels for loading or unloading at the piers aforesaid will lie.

(21) 3. The City of New York is without right to excavate, dredge or remove any soil or part of the granted premises between the streets and avenues east of the bulkhead line of 1890.

(22) 4. The City of New York, its agents, servants, contractors, representatives or assigns, or any person or persons whatsoever claiming to have authority from the said City should be enjoined from excavating, dredging or removing the soil of plaintiffs' said premises east of the bulkhead line approved by the Secretary of War.

(23) 10. The City of New York should be enjoined and compelled to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street.

(24) 11. That the plaintiff has suffered no damage beyond nominal damages by reason of the dredging of the soft yielding mud by the City in the area between 38th and 42d Streets westerly of Twelfth Avenue.

(25) That judgment be entered herein in accordance with the foregoing findings of fact and conclusions of law."

*Additional Conclusions:*

"26. The Legislature of this State extinguished the '*jus publicum*' in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.

27. Chapter 182 of the Laws of 1837 vested in the Mayor Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners and the adjacent upland, subject only to the power of the Federal Government to regulate commerce.

28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.

29. The action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 does not impair or destroy the property and rights of the plaintiff.

30. Said action of the Dock Commissioners with the approval of the Commissioners of the Sinking Fund, does not prohibit the plaintiffs from filling in said premises out to the bulkhead line established by the Secretary of War.

31. The deeds by the City in the years 1853 1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation.

32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue.

33. The plaintiffs are not entitled to an injunction restraining The City of New York from

using or authorizing the use by others of the plaintiffs' premises either within or without the Federal bulkhead line, for the purpose of mooring, docking and floating boats."

With respect to case No. 16 little need be added to what has been said in the preliminary statement. It will be noted, however, that in the conclusion of law No. 29 in case No. 15, above quoted it was held that the action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 did not impair or destroy the property and rights of the plaintiffs. This plainly meant that this action of 1916 could not be allowed to have this effect because of the plaintiffs' rights. What was done in 1916, while the suit No. 15 was pending, is fully shown in the record in No. 16.

The Act of 1871, with amendments, relating to the improvement of the waterfront, were carried forward first into the Consolidation Act of 1882 (Laws of 1882, Chapter 410, Secs. 711 *et seq.*) and later into the Greater New York Charter. Under this Charter, the Commissioner of Docks was authorized with the approval of the Commissioners of the Sinking Fund to adopt and execute plans for the waterfront and to fix and establish the line of solid filling, bulkhead and pierhead lines, the distance between the piers, method and character of construction of wharves and piers within the entire territory of the City of New York.

The provisions of the Charter in force at the time of the adoption of the "new plan" of 1916 were as follows:

"§817. All the powers and duties heretofore vested in and devolved upon the department of

docks of the mayor, aldermen and commonalty of the city of New York, are devolved upon and vested in the department of docks hereby created and in addition thereto the powers and duties of said department are hereby extended so as to include all the water front, wharf property, lands under water, wharves, piers, bulkheads and structures thereon, situate, within the county of Kings; the county of Richmond and the county of Queens; and the said commissioner of docks shall have power, by and with the approval of the commissioners of the sinking fund, to adopt and execute a plan or plans for the water front of the city of New York, as constituted by this act, and to fix and establish the line of solid filling, bulkheads and pierhead lines, the distance between piers, method and character and construction of wharves and piers within the entire territory of the city of New York, as constituted by this act.

§818. \* \* \* The commissioner of docks shall not have power to change the exterior line of piers and bulkheads, established by law, except by the adoption of a plan or plans for the improvement of the water front of the city of New York as herein constituted, by and with the approval of the commissioners of the sinking fund. \* \* \*

§819. \* \* \* No wharf, pier, bulkhead, basin, dock, slip, exterior street or any wharf, structure or superstructure shall be laid out, built or rebuilt, within such territory or district except in accordance with such plan or plans, provided that said commissioner of docks, with the consent and approval of the commissioners of the sinking fund, may, from time to time, change the width or location of the piers laid down on said plan or plans;

and provided, also, that said commissioner of docks may build, or rebuild, or license, or permit the building or rebuilding, of temporary wharf structures, and said commissioner may lease land covered with water belonging to the city of New York for the purpose thereof, such lease, or permit to continue and remain at the will and pleasure of said commissioner, or for a time not longer than until the wharves, piers, bulkheads, basins, docks, or slips to be built or constructed according to such plan or plans, shall in the judgment of said commissioner, require and need to be built or constructed; and provided, further, that the commissioner of docks with the consent and approval of the commissioners of the sinking fund may alter and extend the present pier head line, as now established, on the Hudson River, between Battery Place and Seventieth Street, and establish a new pier head line between these points, and may authorize the construction of new piers out to said pier head line, and may extend those piers already built out to said line; and may build new piers or extend piers already built, out to such pier head lines as are now or may hereafter be established by the secretary of war under act of congress. The commissioner of docks is hereby authorized and empowered, with the consent and approval of the commissioners of the sinking fund, after a public hearing shall have been given by said commissioners of which hearing and its purposes at least seven days' notice shall be published in the City Record, to alter, amend and modify any and all existing plans for the improvement of the water front hereinbefore recited or which may have been determined upon or adopted in pursuance hereof notwithstanding that any or all of such plans may

have been wholly or partially physically perfected and improvements made in conformity therewith. And any such alteration, amendment or modification may include the elimination and closing of any marginal wharf, street or place shown on any plan, whether or not such marginal wharf, street or place has ben physically constructed, and any such altered, amended, or modified plan or any new plan determined upon or adopted in pursuance of the provisions of this section need not provide for or show any such marginal wharf, street or place. \* \* \*

In pursuance of this legislative authority, the Department of Docks on May 1, 1916, proceeded to amend the plan for the water front between West Thirty-eighth Street and West Forty-second Street on the Hudson River so as to discontinue the bulkhead line as it had been fixed and to establish a "new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place" (*Record*, No. 16, pp. 59-60). The Commissioners of the Sinking Fund approved this new or amended plan (*id.*, pp. 57, 60, 61) which accordingly became effective so far as legislation of the State could make it effective. It was solely because of this new plan that the Commissioner of Docks rejected the plaintiffs' application for permits to proceed with the improvement of their property (*id.*, p. 35) and this new plan and its requirements were the only answer presented in the affidavit of the Commissioner of Docks, which constituted the only pleading in opposition to the petition for *mandamus* (*id.*, pp. 64, 65, 67, 68) and is recited in the order denying the application (*id.*, pp. 3-4).

### ***Errors Relied On.***

Without repeating the various assignments of error in the two cases (*Records*, No. 15, pp. 574-578; No. 16, pp. 81, 82), the errors complained of may be summarily stated as follows:

*As to No. 15:*

(1) The State court erred in holding that the action of the Secretary of War in fixing a pierhead line (which lay far outside the limits of plaintiffs' premises) had the effect of altering or limiting the plaintiffs' rights as against their grantor, the City of New York. The plaintiffs are not seeking to fill in beyond the Secretary of War's bulkhead line, and do not assert any rights with respect to piers beyond the Secretary of War's pierhead line. To the extent of the plaintiffs' grants, beyond that bulkhead line and within that pierhead line, the Act of Congress and the action of the Secretary of War in exercising authority thereunder in no way changed the plaintiffs' contracts with the City or their proprietary rights under their grants. As against the City, the plaintiffs had absolute title in fee simple according to their grants with all the rights of improvement which went with that ownership, subject only to the appropriate control of the Federal Government. If the City desired to re-invest itself with these proprietary rights in order to carry out its new plans, it was bound to acquire the plaintiffs' title by appropriate condemnation proceedings and the payment of just compensation.

(2) In view of plaintiffs' rights of property and the guarantees of the Federal Constitution protecting them,



the relief granted by the State court was inadequate and the plaintiffs are entitled to an injunction restraining the City of New York, its representatives and lessees, from asserting and exercising proprietary rights over the plaintiffs' property as prayed for in their complaint.

*As to No. 16:*

(3) The State court erred in giving effect, by the order denying a *mandamus*, to the new plan of the City, the adoption of which constituted legislative action in deprivation of plaintiffs' rights under their grants. Under these grants, in accordance with their true construction (which this Court when the question of impairment of obligations of contracts is involved will determine for itself) and in accordance with the construction placed upon them by the final judgment of the State court in No. 15, the City and its representatives had no right to refuse permission to the plaintiffs properly to improve the granted property. The only extent to which the permission of the City could be required is with respect to such police regulations as might be appropriate in relation to the execution of the work. The permission of the City through its Department of Docks was not refused upon any such ground, or because the plaintiffs' plans of improvement were not appropriate, but simply because the City had attempted to lay down a new plan depriving plaintiffs of their rights.

(4) The State court erred in not giving judgment for the plaintiffs awarding them a *mandamus* as sought.

### POINTS.

In support of the assignment of errors, we present the following points:

First. It was competent for the State of New York to establish the *ripa* about the City of New York and to make or provide for grants on valuable consideration of title in fee simple in pursuance of a plan for water front improvement. Such action was subject to the controlling authority of Congress in the regulation of interstate and foreign commerce, but aside from conflict with that paramount authority, and as between the State and grantees, the grants made by the State or by the City under its authority are inviolable.

Second. The grants in question conveyed title in fee simple to the premises described. The *jus publicum* was extinguished and the grants conveyed absolute title to the grantees according to the terms of the grants.

Third. The action of the Secretary of War in defining bulkhead and pierhead lines merely limited the plaintiffs' rights accordingly. They still enjoyed the absolute right to fill in the premises up to the bulkhead line so determined and to improve their premises beyond the bulkhead line in a manner consistent with the lines of the Secretary of War. The attempt of the State and of the City under its authority to prevent the erection of piers over the plaintiffs' premises outside the bulkhead line and not in conflict with the Secretary of War's pierhead line was a violation of the plaintiffs' rights of property.

Fourth. With respect to the requirement of permission by the City for making of the plaintiffs' improve-

ments, this Court will determine for itself the true construction of the grants.

Fifth. The true construction is that the plaintiffs are entitled to improve the granted premises in accordance with the terms of the grants, at their pleasure and without the consent of the City of New York. At most, the City could only insist upon a reasonable police supervision.

Sixth. The adoption of the new plans of 1871 and 1916 by the Department of Docks with the approval of the Commissioners of the Sinking Fund under the provisions of the Act of 1871 and the Greater New York charter was legislative action within the meaning of the contract clause of the Federal Constitution.

Seventh. The State court in the *mandamus* proceeding gave effect to this action impairing the obligation of the plaintiffs' contract.

Eighth. The plaintiffs are entitled to judgments in both cases protecting their grants and property rights.

### Argument.

**First.** It was competent for the State of New York to establish the *ripa* about the City of New York and to make or provide for grants on valuable consideration of title in fee simple in pursuance of a plan for water front improvement. Such action was subject to the controlling authority of Congress in the regulation of interstate and foreign commerce, but aside from conflict with that paramount authority and as between the State and grantees, the grants made by the State or by the City under its authority are inviolable.

There can be no question here of the power of the State to convey absolute title to the premises in question. When the Revolution took place, the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government (*Martin v. Waddell*, 16 Pet. 367, 410). "The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce" (*Hardin v. Jordan*, 140 U. S. 371, 382).

See also

- Den v. Jersey Company*, 15 How. 426, 432, 433;  
*Weber v. Harbor Commissioners*, 18 Wall 57,  
 65, 66;  
*Barney v. Keokuk*, 94 U. S. 324, 338;  
*Packer v. Bird*, 137 U. S. 661, 669;  
*St. Louis v. Rutz*, 138 U. S. 226, 242;  
*Manchester v. Massachusetts*, 139 U. S. 240,  
 257;  
*Shively v. Bowlby*, 152 U. S. 1, 15 *et seq.*;  
*Philadelphia Company v. Stimson*, 223 U. S.  
 605, 632.

The well established principle was stated recently in *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56, 63, as follows:

"The character of the State's ownership in the land and in the waters is the full proprietary right. The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights."

The principle that the State of New York is fully competent, when its action is not in conflict with the exercise of Federal authority, to make absolute grants in fee simple of water lots or land under water along and in navigable streams has had abundant recognition by the courts of the State of New York and underlies the development of the water front of the City of New York.

In *Towle v. Remsen, et al.*, 70 N. Y. 303, 308, the Court said:

"The land under water originally belonged to the Crown of Great Britain, and passed by the Revolution to the State of New York. The portion between high and low water mark, known as the *tide-way*, was granted to the city by the early charters (Douglass charter, Secs. 3 and 14; Montgomerie charter, Sec. 37), and the corporation have an absolute fee in the same (*Nott v. Thayer*, 2 Bosw. 61). It necessarily follows that the city had a perfect right, when it granted to the devisees of Clarke, to make the grant of their portion of the land in fee simple absolute. As to the land outside of the *tide-way*, the city took title under chapter 115 of the laws of 1807, with a proviso giving the pre-emptive right to the owners of the adjacent land in all grants made by the corporation of lands under water granted by said act. \* \* \* The Legislature left it to the city to dispose of the interests mentioned upon the proviso referred to; but it enacted no condition that it should not dispose of that which it owned in fee simple upon such terms as it deemed proper, and in the absence of any such enactment, such a condition cannot be implied."

In *Langdon v. Mayor*, 93 N. Y. 129, 155, the Court said:

"In this country the State has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State. \* \* \*

\* \* \* These powers result from its sovereignty, and the absolute control which, in consequence thereof, it has over the public domain within its limits. The right to grant the navigable waters is as absolute and uncontrollable (except as restrained by constitutional checks) as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people.

If the grant to Astor had been made directly by the legislature, or by the commissioners of the land office, under its authority, it would have been inviolable as a contract within the protection of the Federal Constitution, the obligation of which no legislative act could impair (*Fletcher v. Peck*, 6 Cranch, 136). It matters not that the grant would limit the power of the State in the exercise of its sovereignty over the public waters, and would so far limit and control future legislatures. The same is true of all grants by the State of any part of the public domain. When valid grants are once made, they are inviolable, and the property granted can be resumed by the State, when needed for public use, only upon making compensation."

In *Williams v. The Mayor*, 105 N. Y. 419, 428, 429, referring to the grants of the water front to the City of New York, and particularly to the Act of 1813, the Court said:

"The authority thus given being commensurate with the municipal limits, involved a grant of so

much of the land of the State under water as those wharves would occupy if the city's choice of location required such appropriation. This right was tantamount to an ownership. It embraced the entire beneficial interest, and was inconsistent with any title remaining in the State. The wharf when built completely occupied the land under water, and might be built, if need be, of stone and earth. All use for the floating of vessels disappeared, so far as it occupied the water. The new and substituted use created by the city or its grantees belonged wholly to them, for the entire benefit in the form of shippage, wharfage and cranage, was given to them. There was never any restraint put upon this general grant, and the ownership involved where the plans carried the wharves on to the State's land in the stream, except the limitation of exterior lines beyond which the authority should not go, or that imposed by general plans agreed upon by both parties \* \* \*.

\* \* \* So that when the State granted to the city wharf rights which might extend into the deep water covering its own land it granted two things: property in the land covered by the wharf and occupied by it and an easement for approach of vessels in its front. That easement the State by its own sole action could not take away or destroy without awarding adequate compensation."

See also,

*Mayor v. Law*, 125 N. Y. 380, 390, 391.



In *People v. Delaware & Hudson Company*, 213 N. Y. 194, 199, the Court said:

"The title to the bed of navigable streams and the control of navigable waters are vested in the state, subject to the limitations found in the Federal Constitution. (*Langdon v. Mayor, etc., of N. Y.*, 93 N. Y. 129.) The state, except for such limitations, has power to grant the title to lands under water, unconditionally or conditionally, or it may grant special rights therein, or it may restrict the boundaries of navigable waters by defining the same."

The familiar doctrine was restated in *People v. Steeplechase Park Co.*, 218 N. Y. 459, 479, 480 as follows:

"During all our history that legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction. Where the state has conveyed lands without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee except as against

the rights of riparian or littoral owners, is absolute, and unless the grant is attacked for some reason recognized as a ground for attack by the courts or the use thereof is prevented by the Federal government, there is no authority for an injunction against its legitimate use."

General expressions here and there in opinions of the State court cannot be taken as qualifying this fundamental doctrine of the *power* of the State. The statements that may be invoked as qualifications can readily be shown not to apply to the State's competency to make absolute grants of water lots and land under water in navigable waters in fee simple, subject only to appropriate Federal control, but to relate to the construction of particular legislation or of the grants themselves or to restrictions under the State constitution. Thus the rights involved may be those only of riparian owners or the Court may be dealing with rights in public streets validly established or with mere licenses. Statements in judicial opinions in such cases have no application here where the grants are in fee simple. The power of the State to make such grants cannot be questioned.

**Second. The grants in question conveyed title in fee simple to the premises described. The *jus publicum* was extinguished and the grants conveyed absolute title to the grantees according to the terms of the grants.**

Grants of this character were essential to the growth and development of the City of New York. The tide-way was granted to the City by the early charters, and the corporation has an absolute fee in it (*Towle v. Remsen*, 70 N. Y., p. 308).

By the Laws of 1807, Chapter 115, the City took title to a strip running 400 feet into the Hudson River from low water mark. Later the Laws of 1837, Chapter 182, which we have quoted above, established the permanent *ripari*. Thirteenth Avenue as laid out in the map to which the Act referred was made a permanent exterior street, and the City of New York was vested with all the right and title of the people of the State to the westerly side of Thirteenth Avenue. The City having title was empowered to make grants of the lands under water out to Thirteenth Avenue and did make them. *The* title was granted to the City in order that it might make grants to private persons for their beneficial use; that is in order that it might make definite and irrevocable grants in fee simple. The grants here in question conveyed in fee the premises described in each grant,

"together with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining;

And, also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part" (the Mayor, Aldermen and Commonalty of the City of New York, that is, the City), "of, in, and to all the said premises and every part and parcel thereof, with the appurtenances" (*Record*, No. 15, p. 368).

There has never been any ground for attack upon these grants under the State Constitution, and no such attack has been made. The grants were made under authority held to be validly conferred. They were not gifts but were made upon valuable and substantial consideration. No question of reasonableness arises, as the

property granted was reasonable in extent and the grants conformed to the established plan for water front improvement. In 1837 when the Smith Map (*Record*, No. 15, Ex. 1, p. 365) was made, the shore line of the Hudson River was very irregular, extending inland at the *locus in quo* nearly as far as Eleventh Avenue. In front of this shore line were mud flats covered by very shallow water. Even as late as 1884 the water over these lands between West 39th and West 41st Streets, so far out as the bulkhead line, was only three or four feet deep. So it is evident that when the grants in question were authorized in 1837, and were made in 1852 and 1853, that these mud flats were in no way necessary for navigation, being removed from the channel or navigable part of the stream. It cannot be said that it was unreasonable, on the contrary it was most reasonable and for obvious public benefit, that these mud flats should be filled in for beneficial purposes. It was entirely competent for the City to plan, and for the State to approve, the establishment of an exterior avenue such as Thirteenth Avenue and to make grants to private persons of the land within the lines of the streets and avenues as thus laid down.

These grants belong to a class of grants, with substantially the same terms, of various water lots and lands under water similar to the *locus in quo*, which the State court has held in many cases operated as conveyances of absolute title in fee simple.

Thus, in *Duryea v. Mayor*, 62 N. Y., 592, 596, referring to such a grant on the East River, the Court said:

"The estate granted is a fee simple, and the deed confers upon the grantee and its assigns all

the rights and privileges of an absolute owner except as restricted by the covenants and reservations contained in it."

In *Langdon v. Mayor*, 93 N. Y. 129, referring to a grant made by the City of a portion of the lands under water embraced within the grant to the City by the Act of 1807 the Court said (p. 145) :

"We think it equally clear that whatever title and property rights the City thus obtained, it could transfer and convey to individuals. Having the power to extend the *ripa* around the City, and thus make dry land, it could authorize any individual to do it. Whatever wharves and docks it could build, it could authorize individuals to build, and whatever wharfage it could take, it could authorize individuals to take. Its dominion over the lands under water, certainly for the purposes indicated in the preamble contained in Section 15 above cited was complete." (The preamble in Section 15, to which reference is made, declared the purpose of erecting and constructing slips and basins and running out wharves and piers.)

Again, in *Mayor v. Law*, 125 N. Y. 380, 391, the Court said with respect to a grant in similar terms of land under water made by the City in 1829:

"The grantee became the absolute owner of the land between the streets—the land granted, and that he could fill up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up."

See also:

*Furman v. Mayor*, 10 N. Y. 567, 569, 570;  
*Williams v. Mayor*, 105 N. Y. 419, 433.

We do not consider it to be necessary to review the long line of authorities in New York, to analyze the opinions and to attempt to define the particular points decided in various cases, for *the record in the present case* is conclusive with respect to the nature and operation of the grants in question.

The construction of these grants, as being grants in fee simple, was recognized in No. 15 by the Appellate Division, whose order and judgment were affirmed by the Court of Appeals. Judge Laughlin, writing for the Appellate Division said (*Record*, No. 15, p. 557; *Appleby v. City of New York*, 199 App. Div. 539, 542, 543):

"It is well settled that these were beneficial grants as distinguished from grants expressly made for the purpose of promoting commerce; and so far as the State and the city were concerned and subject only to the control of the United States over navigable waters, the grantees from the city acquired an absolute right to fill in the premises granted between the street and avenue lines, but not to make the streets, avenues, bulkheads and wharves until called upon by the city so to do, or until the city approved plans therefor, and thenceforth any and all rights of the State or the city to claim that any of the waters within the lines of the premises so granted were navigable were abandoned."

And, despite various expressions which are not altogether clear in the opinion of the Court of Appeals, it would seem that the principle of construction so far as the grants in question were concerned was recognized. For the Court said (*Record*, No. 15, p. 568; *Appleby v. City of New York*, 235 N. Y. 351, 361) :

"But the United States acts as sovereign and the state of New York acts also as proprietor. The authority of the state in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery v. Portland*, 190 U. S. 89; *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips."

And again the Court of Appeals said in closing its opinion (*Record*, No. 15, p. 569; 235 N. Y., p. 363) :

"\* \* \* The right of the grantee to fill in his land under water with solid filling (*Duryea v. Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. But such grant having once been made, titles traced back to the state as proprietor may not be divested by such regulations, without compensation.

The grant to plaintiffs being a property right

which can be resumed by the city only on payment of compensation, was a grant of all the title the city had to convey. The right of the public was not thereby extinguished. The city had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the city in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the city to convey to private owners."

But we are not remitted to the endeavor to construe either the opinion of the Appellate Division or of the Court of Appeals in the present case, or in other cases, for we have in the record in No. 15, *Appleby v. The City of New York*, the definitive judgment entered. This constitutes the conclusive determination, so far as the State Court is concerned, of the construction and effect of the grants in question. The Judgment in the trial Court was entered upon its Decision containing the findings of fact and conclusions of law concerning the issues raised by the pleadings and directing the entry of judgment (*Record*, No. 15, Judgment, p. 202). The Appellate Division of the Supreme Court expressly affirmed the findings of fact of the trial Court and modified and added to the conclusions of law of that Court. The Appellate Division set forth the modifications and the additional conclusions in its order and judgment (*id.*, pp. 549-551). Except as thus modified and added to, the findings and conclusions of the trial Court were affirmed (*id.*, p. 551). The Court of Appeals on cross appeals affirmed the judgment of the Appellate Division (*id.*, pp. a, b, c). The



Decision upon which the final judgment thus affirmed rests, and its findings of fact and conclusions of law, constitute a final and conclusive determination, an estoppel of record as between these parties, so far as the State court is concerned and except as the plaintiffs-in-error challenge the determination in this Court. This judgment and final determination as the record discloses it could not be altered by any expression in the opinion of the Appellate Division or Court of Appeals. The Appellate Division modified the Decision and the Judgment based upon it and what it did in settling the Decision and the Judgment constitutes its determination, not what it said in its opinion. Similarly, the Court of Appeals affirmed the judgment of the Appellate Division and that record became its determination, not what it said in its opinion.

What was thus determined in the Decision modified by the Appellate Division and in the Judgment reciting it and based upon it, and finally affirmed, is not left to inference. It is set forth in unusually explicit terms. We have in our statement of the case quoted in full the conclusions of law thus made and finally established as a determination of the nature and effect of the grants in question, so far as the State courts are concerned, and we need only refer to a few of them in order to establish the proposition that these grants conveyed to the grantees absolute title to the premises in question in fee simple and according to the terms of the grants.

Thus it was determined in Conclusion 3 (*Record*, No. 15, p. 195) as modified by the Appellate Division (*id.*, p. 549) :

“By the deeds from the Mayor, Aldermen and Commonalty of the City of New York to Charles

E. Appleby and Robert Latou, set forth in the amended complaint, the grantees and their assigns, acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds, with the right to fill in and improve the same at their pleasure, subject to the Federal Government's power to control."

Again, it was determined in Conclusion 5, as modified by the Appellate Division (*id.*, pp. 196, 549) :

"The right to fill in or improve said premises as aforesaid, is a vested property right which cannot be taken from the plaintiffs, without compensation, except by the paramount right of the Federal Government."

And not content with these definitive conclusions, the Appellate Division added the following (*id.*, p. 550) :

"26. The Legislature of this State extinguished the '*jus publicum*' in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.

27. Chapter 182 of the Laws of 1837 vested in the Mayor, Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners and the adjacent upland, subject only to the power of the Federal Government to regulate commerce.

28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.

\* \* \* \* \*

31. The deeds by the City in the years 1853 and 1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation."

When, therefore, we urge that the *jus publicum* in the premises in question had been extinguished, we are merely stating what the Decision and Judgment in No. 15 explicitly determines. So far as these parties are concerned, it is really not of consequence to examine the precedents in the State court, or even to analyze the opinion of the Court in the present case and its remarks upon *jus publicum* and *jus privatum*, for it has been finally determined after a full litigation between these parties that with respect to the premises embraced in the grants in question the *jus publicum* was extinguished. We think it could easily be shown, to the point of demonstration, that this is the effect of numerous decisions in the State court and that these conclusions we have quoted necessarily followed from the applicable precedents. We could also show that the general expressions which counsel for the City may cite to the contrary are not really in opposition to these precedents when the particular points involved in those expressions

of opinion are considered. But whatever may be said with respect to the efficacy of such a line of argument, it is not needed here because of the explicit terms of the Decision and Judgment.

As it is thus determined that the grantees under the grants in question acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to their grants, with the right to fill in and improve the same at their pleasure, subject to the Federal Government's control; as it is determined that the *jus publicum* in these premises was extinguished; as it is determined that the grants were made under competent authorization and constitute valid contracts which could not be impaired by subsequent legislation by the State of New York without compensation; we deem it unnecessary to argue the point that these grants are inviolable.

All that is needed is to carry this principle to its logical conclusion, to give effect to these grants as valid grants, according to their terms, to award to plaintiffs the constitutional protection to which they are entitled by reason of their contracts and property rights. The State court in its decision and judgment sustained the grants but after holding them to be conveyances of the absolute title, and after determining that the grantees could not be deprived of their property without compensation, proceeded to deny protection to the property to the full extent to which the plaintiffs were entitled, both with respect to certain incidents of their ownership and in the relief afforded.

This brings us to the question of the effect of the Secretary of War's action in defining bulkhead and pier-head lines.

**Third.** The action of the Secretary of War in defining bulkhead and pierhead lines merely limited the plaintiffs' rights accordingly. They still enjoyed the absolute right to fill in up to the bulkhead line so determined and to improve their premises beyond the bulkhead line in a manner consistent with the lines of the Secretary of War. The attempt of the State and of the City under its authority to prevent the erection of piers over the plaintiffs' premises outside the bulkhead line and not in conflict with the Secretary of War's pierhead line was a violation of the plaintiffs' rights of property.

There is no controversy with respect to the Secretary of War's bulkhead line; that bulkhead line could not, in the light of the terms of the grants in question, have been established by the State inshore of the exterior line fixed by the plaintiffs' grants. That would have constituted action by the State in derogation of the rights and property specifically granted. But the grant of the City with the authority of the State was, of course, subject to the paramount authority of Congress in the regulation of interstate and foreign commerce, and it was in pursuance of this paramount power that the Secretary of War fixed the bulkhead line. His action, which defined the same bulkhead line as that attempted to be defined by the City under the Act of 1871, was determinative although the action of the State alone could not be. This bulkhead line was the line of solid filling and the plaintiffs could not fill in beyond that line. As we shall see later, with reference to the final order entered in the *mandamus* proceeding (No. 16), the City has sought to prevent, and by that order has succeeded in preventing,

the plaintiffs from filling in even up to the bulkhead line; that is, the City has attempted to make a new bulkhead line inside of the Secretary of War's bulkhead line and to deprive the plaintiffs of their right to fill in up to the latter. But this is with respect to the order in No. 16. The order and judgment of the Appellate Division, which was finally affirmed in No. 15 determined in so many words that

"28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890" (*Record*, No. 15, p. 550).

So that, so far as the judgment in No. 15 is concerned, with respect to the rights of the parties under the grants, there is no controversy with respect to the *bulkhead* line.

There is, however, a serious question presented with respect to the Secretary of War's *pierhead* line and an effect was given to his action in fixing the pierhead line which we believe to be entirely unwarranted.

While the enjoyment by the plaintiffs of the property and rights granted was subject to the proper action of Congress under the commerce clause, it is evident that the plaintiffs retained their full rights under their grants, and were entitled to be protected in their enjoyment, except so far as appropriate Federal action interfered therewith. The Secretary of War's action in fixing a pierhead line merely established the limit to which piers could be built outside the bulkhead line. This limit was

700 feet beyond the bulkhead line. This was far beyond the limit of the premises granted to the plaintiffs; it was far beyond the westerly side of Thirteenth Avenue as originally planned. There was between the bulkhead line fixed by the Secretary of War and his pierhead line a considerable space which was covered by the plaintiffs' grants. The plaintiffs, it is true, after the bulkhead line had been fixed by the Secretary of War could not fill in beyond that line, but they had acquired through the grants all the rights of the City in and to the space between that bulkhead line and the exterior line of their grants, and this space they were fully entitled to use as the City could have used it. The action of the Secretary of War in no way interfered with this use so long as piers were not extended beyond his pierhead line.

The grants in question conveyed the premises between the streets and avenues described "with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining," and also conveyed "all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part" (the City) "of, in and to all the said premises and every part and parcel thereof, with the appurtenances" (*Record*, No. 15, pp. 368, 381). Moreover, the grantees were respectively entitled to "have, enjoy, take and receive and hold to his own proper use, all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from that part of the exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever" (*id.*, pp. 374, 385). There was excepted from this the wharfage, cran-

age, advantages and emoluments growing or accruing from the westerly end of the bulkhead in front of the streets, but this was solely with respect to the part of the bulkheads in front of the streets and not to the wharfage, cranage, advantages or emoluments which might grow or accrue from the part of the exterior line of the city, as defined in the grants, lying on the westerly side of the granted premises, that is, between the streets.

There were thus important rights and privileges as to the spaces between the Secretary of War's bulkhead line and his pierhead line which the City, except for its grants, could have used to profit, and which the grantees of the City under valid grants were entitled to use to profit.

It should be emphasized that the Secretary of War in defining the pierhead line did not adopt the City's pier plan or regulate the spaces between piers. So long as solid filling did not go beyond his bulkhead line, and piers did not go beyond his pierhead line, it was entirely competent, so far as the Federal Government was concerned, for the grantees of the City to build whatever piers they chose, not of solid filling but of open piled work, upon the premises granted to them. In Defendant's Exhibit C (*Record*, No. 15, p. 529) giving an extract from the map of the Secretary of War showing his pierhead line of 1897, only a part of the map is shown. We shall produce a duplicate of original upon the argument. It is an authenticated document of the Federal Government, about which there can be no dispute and it bears this note:

"The bulkhead line defines the limit for solid filling; the pierhead line, the limit to which open piled structures may be built."



If the Court will refer to the official document containing the description of the pierhead and bulkhead lines published by the War Department (War Department, Corps of Engineers, United States Army, "Detailed Descriptions of the Pierhead and Bulkhead Lines for the Waterfronts of Part of the City of New York," approved by the Assistant Secretary of War, February 15, 1902, G. L. Gillespie, Brig. Gen., Chief of Engineers, United States Army, 1902), the Court will find on pages 31-33 the definition of the pierhead lines. There is no adoption of a pier plan within the pierhead line and no determination as to the spaces between the piers. On the contrary, as shown by the note upon the Secretary of War's map there was no prevention by his line of open piled structures. Can it be seriously questioned but that if the City had not made these grants, and had not changed its plans, it could have put in open piled structures running out from the bulkhead line at the *locus in quo* to the Secretary of War's pierhead line? And what the City could have done, had it not made these grants, its grantees are entitled to do by the very terms of the grants.

Now, of this important right thus to enjoy and improve their property, the plaintiffs, notwithstanding that they have invoked the guarantees of the Federal Constitution, have been deprived by the State. The State Court in No. 15, as well as in No. 16, has disregarded this right and denied the protection to which the plaintiffs are entitled.

The decision upon this point is found in Conclusion No. 32 of the Appellate Division, as follows:

"The Federal statutes and the action of the Secretary of War in establishing a bulkhead line

across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue" (*Record*, No. 15, p. 550).

This determination, we contend, is erroneous for these reasons :

(1) It is recognized that "the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space."

This, as it seems to us, shows conclusively that the plaintiffs' rights, with respect to the space between the bulkhead line and the pierhead line, did not conflict with the action of the Federal Government.

(2) It is said that "the State Government had a right to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines."

But it is submitted that the State Government had no more right, in derogation of the plaintiffs' grants, to regulate the construction of docks, piers and wharves between said bulkhead and pierhead lines than they had the right to regulate the construction of bulkheads or lines of solid filling within the premises granted to the plaintiffs. The deeds to the plaintiffs did not stop at the line subsequently fixed as the bulkhead line, but ran to Thirteenth Avenue, the exterior street laid down on the plan of 1837. As against the City and the State, the plaintiffs' rights extended throughout the premises granted, excepting only the portions of the plot that lay within the streets and avenues. If, as the Court below found in Conclusion 29 (*id.*, p. 550) that the changing of the bulkhead line in 1916 could not impair the property and rights of the plaintiffs, how could the action of the City after the making of the grants, in attempting to establish a pier plan, interfere with the property and rights of the plaintiffs? There was only one power which could interfere with the property and rights of the plaintiffs and that was the Federal Government acting under authority of Congress in the regulation of interstate and foreign commerce.

(3) Again, it is said, in the Conclusion above quoted, that the State "having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials to

adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

This is a clear statement of precisely what the State had no right to do. It is a definite statement of subsequent legislation impairing the obligation of the plaintiffs' contracts. It is an assertion of the right of the State to destroy *pro tanto* the plaintiffs' grants. It is said that the plaintiffs are prevented from erecting any pier, wharf or structure whatsoever upon their premises between the bulkhead line and the Secretary of War's pierhead line. The Secretary of War has said that his pierhead line does not prevent open piled structures in this space. Thus the State, despite the grant made under its authority of absolute title in fee simple, as the Court has held, has attempted to prevent, with respect to the premises within the limits of the grant, precisely what the Secretary of War permits.

In short, by the determination of the State Court, effect is given to the legislation of 1857 and 1871, subsequent to the grants, in taking away from the plaintiffs all enjoyment of the property granted outside the Secretary of War's bulkhead line. They cannot build piers; they cannot build any structure. They cannot have wharfage or cranage at the bulkhead line or anywhere. Not only is this true, but instead of building streets and avenues bordering the granted premises, which as the

grants provided should be open for the common use of the inhabitants of the City and which would be of great advantage to the plaintiffs as owners of the granted premises and with respect to which they would have valuable easements, the City has constructed piers for the exclusive use of itself and its lessees as proprietors. Thus the plaintiffs are shut out entirely from all the privileges of their grants.

In the light of this determination, it seems almost ironical to say, as was conclusively established by the decision and judgment finally affirmed, that the grantees "acquired the absolute title to the intervening spaces between the streets and avenues, shown on the maps annexed to said deeds with the right to fill in and improve the same at their pleasure, subject to the Federal Government's power to control," and that "the grants constituted valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation" (*Record*, No. 15, p. 550).

We submit that the plaintiffs are entitled to the full enjoyment of their premises so far as it can be had consistent with the Secretary of War's action.

**Fourth.** With respect to the requirement of permission by the City for the making of the plaintiffs' improvements, this Court will determine for itself the true construction of the grants.

It is a well settled rule that when a case arises under the contract clause of the Federal Constitution, the Court will determine for itself, independent of the judgment of the State Court, (a) whether there is a contract,

(b) whether the subsequent legislation does impair its validity, and (c) whether the State Court has given effect to that legislation.

"The question of the existence or non-existence of a contract in cases like the present is one which this Court will determine for itself, the established rule being that where the judgment of the highest court of a state by its terms or necessary operation gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligations" (*Mobile & Ohio R. R. Co. v. Tennessee*, 153 U. S. 486, 492, 493).

See also:

*Jefferson Branch Bank v. Skelly*, 1 Black 436, 443;

*University v. People*, 99 U. S. 309, 321;

*McCullough v. Virginia*, 172 U. S. 102, 116, 117;

*Houston & Texas Central R. R. Co. v. Texas*, 177 U. S. 66, 77, 78;

*Hubert v. New Orleans*, 215 U. S. 170, 175;

*Cross Lake Club v. Louisiana*, 224 U. S. 632, 638, 639;

*Carondelet Canal Co. v. Louisiana*, 233 U. S. 362, 376-378;

*Louisiana Railway & Navigation Co. v. New Orleans*, 235 U. S. 164, 170, 171;

*Columbia Railway Co. v. South Carolina*, 261 U. S. 236, 245-247.

There is no inconsistency in the application of this familiar principle and the recourse to the local law with respect to title to the soil under navigable waters within the territorial limits of States and the extent of riparian rights. The State has no privilege, in the case of grants of lands under water, any more than in any other case, to impair the obligation of contracts. The constitutional protection extends to such grants as well as to other contracts. The reference to local law with respect to general questions of title, riparian rights, etc., is always, as this Court has said, "subject to the condition that their rules" (that is, the rules of the State) "do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

*Packer v. Bird*, 137 U. S. 661, 669.

In the present case there is no open question as to the title of the State, of the City, or of the plaintiff's holdings grants from the City. The judgment between these parties as we have seen covers all these points;—the title of the State and its competency to grant; the title of the City and its authority to make the grants, and the effect of the grants as absolute conveyances in fee simple of the property in question.

When the question is presented, therefore, with respect to the construction of the grants, and it appears that there is an attempt to "impair their efficacy" and to deny the right to the use and enjoyment of the property by the grantees, by virtue of subsequent legislation, it is the privilege and duty of this Court to construe the grants for itself in order to determine whether their obligations are impaired.

The question of the construction of the plaintiffs' grants with respect to the requirement of permission by the City for the making of improvements on the premises granted is a question of this sort, for, by withholding permission, the City is endeavoring to give effect to subsequent legislation which if sustained would impair the obligation of the contracts. It is in this view that the contention as to the permission of the City will be considered.

**Fifth. The true construction of the grants is that the plaintiffs are entitled to improve the granted premises in accordance with the terms of the grants at their pleasure and without the consent of the City of New York. At most, the City could insist upon a reasonable police supervision.**

In the Decision and Judgment in No. 15, defining the rights of the plaintiffs under their grants, there was nothing which gave the slightest color to the contention that the plaintiffs could not improve the granted premises within the bulkhead line according to the terms of the grant without the City's permission or that they were bound to seek the City's permission. On the contrary, it was distinctly held that the plaintiffs could improve their premises in accordance with the terms of the grants at their pleasure and without the consent of the City of New York, so far as the improvements within the bulkhead line were concerned. Thus, in the additional conclusion of law incorporated in the decision by the order and judgment of the Appellate Division, which was finally affirmed, it was provided as follows:

"28. The plaintiffs have the right to fill in and make dry land *at their pleasure, and without*



*the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890."* (Italics ours.) (*Record*, No. 15, p. 550.)

The question of the permission of the City, so far as the right to fill in up to the bulkhead line was concerned, was brought up in the *mandamus* proceeding in No. 16. It should be observed that this proceeding was instituted in 1920 after the judgment had been entered on the decision of the trial Court in No. 15. The rights of the plaintiffs to a certain extent had been sustained by that judgment and it was the understanding, we believe, of both parties, that under that judgment, even without the precise and additional conclusions set forth later by the Appellate Division, the plaintiffs were entitled to fill in up to the bulkhead line. They had been compelled, as we have seen, to pay large taxes upon the property. In this situation, they decided upon making improvements and they filed their application with the Department of Docks for the usual permit. This was simply in recognition of the police power of the City, for in all municipalities no one can move a step in connection with any improvement without a permit, which does not imply a lack of the rights of ownership, but simply a recognition of the necessary police control of building operations within the City's limits. Such operations must be conducted with due regard to reasonable regulations to promote safety and respect for rights of other property owners, etc. But the authority that the municipality has with respect to such permits does not extend to the overriding of property rights and the refusal to permit

the exercise of these rights consistently with reasonable police regulations.

When the application was thus made by the plaintiffs in 1920, the City resisted. It pleaded, as has been shown, simply that the Department of Docks with the approval of the Commissioners of the Sinking Fund had made a "new plan" moving the bulkhead line 100 feet inshore of the Secretary of War's bulkhead line, that is, purporting to cut off 100 feet of the premises which admittedly the plaintiffs were entitled to improve. There was no criticism of, or objection to, plaintiffs' plans for improving the property with reference to their reasonableness or to the application of police regulations. It was simply answered that these plans of improvement were inconsistent with the City's new plan of moving back the bulkhead line, and that therefore the Department of Docks was without authority to grant the application.

Upon the hearing of the petition for *mandamus* to enforce the plaintiffs' property rights, when there was no other question before the Court upon the pleadings, except the adoption of the new plan in derogation of these rights, it was said by the Court of first instance that the grant was made upon condition that permission should be obtained before structures could be erected.

Appeal was then taken to the Appellate Division and there the order denying the *mandamus* was reversed upon the ground that there was no objection to the plaintiffs' plans, that they were entitled to improve their property and that the *mandamus* should be granted with the sole reservation of the opportunity to the City to acquire the property by condemnation if they took such a proceeding within a stated time. This was entirely consistent with the determination of the Appellate Divi-

sion which they made at the same time in modifying, and affirming as modified, the judgment in No. 15.

But the Court of Appeals affirmed the decision of the Appellate Division in No. 15 and reversed its decision in No. 16, stating in its opinion that permission of the City was necessary before any improvement could be made.

Now, coming to this question of permission, and of the true construction of the grants in this respect, it will be observed that the question has two phases. The one is with respect to the terms of the grants themselves; the other is in relation to a provision of a City ordinance of 1844. So far as the terms of the grants themselves are concerned, the Court of Appeals made the following statement in its opinion (*Record*, No. 16, pp. 78-79, *Matter of Appleby v. Delaney*, 235 N. Y. 364, pp. 366-367):

"The water grants under which relators hold title also provide:

"And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without

the permission of the said parties of the first part or their successors or assigns first had for that purpose.'

In *Duryea v. Mayor, etc.* (62 N. Y. 592), it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (*Duryea v. Mayor, etc.*, 96 N. Y. 477), it was said that the provisions of the sinking fund ordinance had not been called to the court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common council would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission."

To this statement, it may be answered, that, if the sinking fund ordinance was not before the Court in *Duryea v. Mayor*, 62 N. Y. 592, the provisions of the water grants, identical with the provisions above mentioned and quoted by the Court of Appeals were before the Court in *Duryea v. Mayor*, and it was held specifically that this covenant not to build the wharves, bulkheads, avenues or streets, or to make the lands in conformity with the covenants mentioned, only applied to the portion of the premises described which were within the

streets and avenues, and thus excepted from the grants, and did not apply to the premises granted. The Court in *Duryea v. Mayor, supra*, said (*id.*, pp. 596, 597), the covenant being the same as that here in question (*id.*, p. 593) :

“There is certainly no express prohibition or covenant against filling in the intermediate spaces between the shore line and the line of the streets, avenues, wharves, etc. The deed conveys nine several pieces of land under water by metes and bounds, adjoining certain contemplated streets running to the East River. The spaces to be occupied by streets are not conveyed. It contains covenants that the grantee shall, within three months after being required, make and construct the streets and wharves and bulkheads referred to, ‘and will also fill in the same with good and sufficient earth, and regulate and pave the same and lay the sidewalks thereof.’ It also contains a covenant that the grantee will not build the streets, wharves, etc. ‘or make the lands in conformity with the covenants hereinafter’ mentioned, until permission shall be obtained from the city. The only covenant in the deed for *making* lands applies exclusively to the building of streets, wharves, etc., and there is not a word pertaining to the intermediate spaces. \* \* \* The estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an absolute owner except as restricted by the covenants and reservations contained in it. The beneficial enjoyment of property belongs to the ownership and the construction contended for would deprive the plaintiff of any such enjoyment, until the city ordered the streets

and other structures to be made. It is a general rule that exceptions and restrictions are to be construed strictly against the grantor and are not to be extended beyond the fair import of the language expressed except by necessary implication. No such implication arises in this case."

In the opinion of the Court of Appeals in No. 16, above quoted, reference is made to *Duryea v. Mayor*, 96 N. Y. 477, but in that case the Court manifestly adhered to the construction of the covenants in the grants, as distinguished from the ordinance (*id.*, p. 488), and apparently thought that the construction given to the covenants could also be applied to the ordinance if it had appeared that the City had not given its consent (*id.*, p. 494).

The Court said (*id.*, p. 496) :

"It is quite inconceivable that parties should purchase land burdened with the condition that it should be enjoyed only by the permission of the grantor, and a construction having that effect should only be adopted when no other is possible or sustainable."

The rule, that the covenants quoted in the opinion of the Court of Appeals did not apply to the granted premises, but only to the portions of land within the streets and avenues, as decided in *Duryea v. Mayor*, 62 N. Y. 592, has been a rule of property in the State of New York which has been applied by the Courts and upon which owners have relied for many years. Thus in *Mayor v. Law*, 125 N. Y. 380, 391, it was said that the grantee under a grant of this sort "could fill up whenever

he chose, suiting his own pleasure as to the time and manner of doing it."

But the extraordinary thing is that the Court of Appeals should have referred to these covenants in the grants, in relation to the question of the necessity of obtaining the City's permission to fill in the premises granted, when at the same time the Court of Appeals was affirming the determination of the Appellate Division in No. 15 and had passed upon that very question and had explicitly held that the permission of the City under these particular covenants was not required. For this question was the subject of conclusions of law contained in the Decision upon which the judgment appealed from was entered, and the conclusions of law in this respect were affirmed by the Appellate Division and by the Court of Appeals without modification. These conclusions are as follows (*Record*, No. 15, Decision, pp. 197, 198):

"(14) VII. The covenant by the grantee, that he, his heirs and assigns

'will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,'

relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

(15) VIII. The covenant by the grantee, that he, his heirs and assigns

'will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose.'

refers only to the lands under water in front of the plaintiffs' premises and there is no such covenant as to the granted premises between the streets and avenues."

Thus we have not only the rule of property established by repeated decisions of the Court of Appeals upon this precise question but a final determination of the question, so far as the State court was concerned, as between these plaintiffs and the City of New York.

So also the Ordinance of 1844 cannot be invoked as against the plaintiffs' grants by any true construction thereof. There is ample room for the contention that this ordinance should be construed in the same way as the covenants in the grants, as was intimated by the Court of Appeals in *Duryea v. Mayor*, 96 N. Y. 494. To say that the City received thousands of dollars, as it did in this case, for grants of property of this sort to be filled in and enjoyed at the grantees' expense, and reserved an arbitrary right to refuse to the grantees any opportunity to make the improvement is absurd. Such a construction of the ordinance is repugnant to the grants themselves and the grants properly construed contain no such condition. But the State court has construed these very grants in the light of everything applicable to that construction by its final determination



in No. 15, and has there held upon the precise point "that the plaintiffs have the right to fill in and make dry land at their pleasure and without the consent of the City of New York of so much of their said premises as lie between the westerly side of Twelfth Avenue and the bulkhead line established by the Secretary of War in 1890" (*Record*, No. 15, Sec. 28, p. 550).

The question then is whether, in the light of this proper construction of the grants, which is reached not by argumentation simply but by the actual determination of the questions between these parties through the judgment in No. 15, the State has been permitted by giving effect to its subsequent legislation to impair the obligation of the grants and thus also deprive the plaintiffs of their rights of property without due process of law.

**Sixth. The adoption of the new plans of 1871 and 1916 by the Department of Docks with the approval of the Commissioners of the Sinking Fund, under the provisions of the Act of 1871 and the Greater New York Charter, was legislative action within the meaning of the contract clause of the Federal Constitution.**

As stated by the Appellate Division in its additional Conclusion 32 in No. 15 (*Record*, No. 15, p. 550), Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of any other pier, and by Chapter 574 of the Laws of 1871 the City of New York was authorized to adopt a plan for the waterfront, including the erection of piers, and by the adoption of pier plans under this statute the plaintiffs have been prevented from erecting any pier or wharf or other structure upon their premises.

Again, it appeared that under the provisions of the Greater New York Charter, carrying forward and amending the Act of 1871 and authorizing the adoption of a plan for the waterfront by the Department of Docks with the approval of the Commissioners of the Sinking Fund, a new plan was made in 1916 moving the bulkhead line inshore 100 feet and this, as has been said, was the answer made by the Department of Docks to plaintiffs' application for a permit for the improvement of their property and the sole answer made by the City in its pleading to the petition for a *mandamus* in No. 16.

Now, it is evident that the Acts of 1857 and of 1871 and the provisions of the Greater New York Charter were all acts of the Legislature of the State of New York. But this action was not complete. It authorized further legislative action which would give the exact rules to be applied through the adoption by the City's department of plans for waterfront improvement. When these plans were adopted by the Department of Docks with the approval of the Commissioners of the Sinking Fund they became effective by virtue of the authority of the Legislature. These plans and their adoption by the authorized department of the City constituted new rules of action for all persons concerned. Thus they established rules of action with respect to the building of piers and structures; there was in the new plan of 1916 another rule of action established with respect to the building of bulkheads. The Legislature, in its authorizing acts, provided in advance the sanction for these rules of action by prohibiting all persons from doing any acts in violation thereof and by assigning penalties for such violation. The moment the Department of Docks acted with the

approval of the Commissioners of the Sinking Fund with respect to the pier plan, which prevents the plaintiffs from building any piers or structures, and with respect to the bulkhead line, which moved the bulkhead line inshore 100 feet of the Secretary of War's bulkhead line, its rules became binding upon all persons with the complete effect of legislative action. What should be done, and what was prohibited, was thus defined by the City acting under authority of the State.

It has frequently been held that where a municipality acts under authority of the State, in laying down rules by by-laws or ordinances, those by-laws or ordinances are considered as *laws* within the meaning of the provision of the Federal Constitution against the passing of laws impairing the obligation of contracts.

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by a legislature to a corporation as a political subdivision of the State having all the force of law within the limits of the municipality that it may properly be considered as a law within the meaning of the article of the Constitution of the United States."

*New Orleans Water Works Co. v. Louisiana  
Sugar Refining Co.*, 125 U. S. 18.

The point is, as stated in *Williams v. Bruffy*, 96 U. S. 176, 183, that "any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause" in question.

See also

*Walla Walla City v. Walla Walla Water Works Co.*, 172 U. S. 1;

*Mercantile Trust & Deposit Co. v. Columbus*, 203 U. S. 311;

*Zucht v. King*, 260 U. S. 174.

The plans adopted by the City under the Acts of 1871, and the Greater New York Charter, have the force of laws, being as clearly *laws* in the strictest sense as though they had been passed directly by the Legislature limiting the action of the plaintiffs. The State has thus exerted its legislative authority defining what the plaintiffs may do or not do with this property.

**Seventh. The State Court in the *mandamus* proceeding (No. 16) gave effect to this action impairing the obligation of the plaintiffs' grants.**

We have already noted how the Court in No. 15 gave effect to the action adopting the pier plan so as to prevent the plaintiffs from improving their property in any way beyond the bulkhead line. In No. 16, by denying the *mandamus* prayed for, the Court gave effect to the new plan moving the bulkhead line inshore. In determining whether effect is given to legislation impairing the obligation of a contract, the Court looks to the substance of things, construing the grant and determining whether in reality the obligation has been impaired. What has happened in this case? Under a true construction of the grants, under the final determination of the State Court with respect to that true construction,

the plaintiffs had a right to fill in their property up to the bulkhead line. The State Court, in No. 15, held that the action of the Commissioner of Docks in establishing the new bulkhead line in 1916 could not impair or destroy the property and rights of the plaintiffs (*Record*, No. 15, p. 550). But if this were so, the plaintiffs were entitled to make their improvements and the City had no right to interfere with them, except to the extent of reasonable police regulations relating to the execution of the work. When the plaintiffs asked for the appropriate permit to go on with the work, which they were entitled to execute, the City refused, simply setting up its new plan, that is, asserting the legislative action taken by the City under the authority of the State Legislature in defining a line to which attached the prohibition of the State that no one should build beyond it. This, as the Appellate Division pointed out, was the only objection; this was the only pleading presented. The State Court, by denying the *mandamus*, necessarily gave effect to the new plan by sustaining the position of the City in denying permission to do anything inconsistent with the new plan. Thus, the plaintiffs have been deprived of the benefits of their grants entirely. The City has taken the property granted for the use of other grantees *sub modo*, that is, lessees. It has appropriated the property of the plaintiffs to the use of these lessees as proprietors, and standing upon its new plan, which is in derogation of these grants and which the State had no right under the Federal Constitution to establish, defies the plaintiffs by refusing them permission to proceed. The State Court has sustained this position of the City and the City thus stands entrenched in its new plan.

**Eighth. The plaintiffs are entitled to judgment protecting their grants and property rights.**

The plaintiffs are entitled to build out to the bulkhead line. The plan for improvements they submitted was in conformity to their rights and there was no objection by the City, as we have said, except upon the basis of the new plan. Accordingly, the order of the Appellate Division was correct to the effect that the *mandamus* should have been granted with opportunity to the City to acquire the rights of property through condemnation proceedings and payment of just compensation. This relates to the relief desired in No. 16.

With respect to No. 15, plaintiffs are entitled to a protection of their rights under the grants not only up to the bulkhead line fixed by the Secretary of War, but from the bulkhead line out to the pierhead line so far as action by the plaintiffs consistent with the Secretary of War's pierhead line may be had. The conclusion of law 32 in the determination of the Appellate Division, affirmed by the Court of Appeals (p. 550) should be set aside and it should be held that the State government had no right by its subsequent legislation to adopt plans which would prevent the plaintiffs from erecting any pier or other structure upon their premises between the bulkhead line and the pierhead line established by the Secretary of War, provided that such piers or structures were not opposed to the Secretary of War's regulation.

Again, the plaintiffs are entitled to an injunction adequately protecting their property rights by preventing the acts of ownership which the City, its representatives and lessees, are committing in respect to and over the granted

premises. The City having built piers within the street lines for the exclusive use of its lessees, having shedded them and built fences and gates, has assumed proprietorship with respect to these piers over the plaintiffs' property in what are called the basins and slips adjoining. These are used as completely as though the City owned them. Vessels are brought in over the plaintiffs' premises to moor at the adjoining exclusive piers. The plaintiffs have the land under the water; the injunction granted in No. 15 (p. 202) compelled the City to take down and remove the overhanging dumping board or platform on the northerly side of the pier in West Thirtieth Street; and yet while the title of the plaintiffs in the soil under the water is recognized, and the plaintiffs' right above the water is recognized, the lessees of the piers are permitted to enjoy the plaintiffs' property between the two as though the lessees owned it themselves. If the premise is correct, as found by the State court in No. 15, that the City granted upon due authorization the absolute title in fee simple to these premises, then the plaintiffs are entitled to prevent acts of ownership over the premises to which they have this title. It should be observed that, as the undisputed evidence shows, the lessees of the piers enjoy the privilege of having vessels moored alongside for docking, unloading, etc., even in shore of the bulkhead line of the Secretary of War.

The question as to such use of the premises in connection with the piers leased by the City is not at all a question of the regulation of public navigation. The Courts below seem to have thought that, so long as there was water there, the City could do as it pleased. But the point is that the City has not established regulations in the interests of navigation in the sense of preserving

public opportunities of navigation with reference to safety and by other reasonable regulations. What the City is doing is appropriating these premises to the proprietary use of itself and its lessees. There is no more public use in its lessees maintaining a wharf than in these plaintiffs maintaining a wharf. There is no more public use in its lessees having a place for vessels to dock by going over the plaintiffs' premises than if the plaintiffs had the privilege of having vessels dock at the plaintiffs' bulkheads and wharves. The City, instead of treating the premises as open to the public, is confining their use to those who have made contracts with it for substantial rentals and is thus taking to itself the profits of plaintiffs' premises as a proprietor in defiance of its grants. It is submitted that the plaintiffs are entitled to an injunction restraining the City, its representatives and lessees; from using in any way the plaintiffs' premises as slips or basins in connection with the City's piers built and maintained as stated.

The plaintiffs not only had the grants of the land under water, but they had easements of light, air and access in the streets and avenues shown on the maps annexed to their grants (*Record*, No. 15, Decision, p. 196). These streets and avenues were to be public streets and avenues for the common use of the inhabitants of the City. The plaintiffs having the adjacent property under their grants would thus enjoy valuable rights in the streets and avenues open to the public. But, instead of recognizing and safeguarding these easements, the City seeks to destroy them. Instead of making and opening streets and avenues for public use it has made exclusive pier sheds and prevented any physical access by the plaintiffs to them. Thus the plaintiffs' property is used



for the benefit of the City's lessees and the plaintiffs are not allowed the enjoyment of their easements in the streets which are occupied by the City's lessees' piers. Plaintiffs, it is submitted, are entitled to an injunction restraining the City from interfering with these easements in the streets and avenues shown on the maps annexed to their grants.

Further, the plaintiffs were entitled to all manner of wharfage, crannage, advantages and emoluments accruing or growing from that part of the exterior line of the said City lying on the westerly side of the premises granted (*id.*, pp. 374, 385). There was excepted the wharfage, crannage, advantages and emoluments to grow and accrue from the westerly end of the bulkhead in front of 39th, 40th and 41st Streets, but there was granted to the plaintiffs what would accrue at the westerly end of the bulkhead between the streets. The Secretary of War's bulkhead line is in-shore of the exterior line defined in the grants, but there is still a westerly line of the granted premises and there is still opportunity, as the Secretary of War's pierhead line is far beyond the limits of the plaintiffs' grants, to pier out to the place at which the plaintiffs were to derive every manner of wharfage, crannage or other advantages or emoluments. But this right has been taken away without compensation. It is manifest that the plaintiffs are entitled to an injunction against any use of the property in question which would deprive them of this right.

There is nothing unreasonable or inequitable in such a protection of the plaintiffs' rights of property. The plaintiffs' predecessors in title paid for them; the plaintiffs are paying taxes upon the assumption that they own them. All that is necessary for the City to do in

order to carry out its new plan and to escape the restrictions of the injunction to which the plaintiffs are entitled, is to condemn the property and pay for it. There is nothing but justice in that. The Act of 1871 contemplated that they would do this. The City started its condemnation proceedings with respect to the *locus in quo* in 1894, and then after many years the proceedings were discontinued. The idea seems to prevail that they can take the plaintiffs' property without paying for it. The plaintiffs ask that their rights be recognized; and, if the City does not wish to acquire the property and pay for it, that the plaintiffs be permitted to improve it according to the terms of their grants and consistently with the exercise of Federal authority.

Respectfully submitted,

CHARLES E. HUGHES,  
BANTON MOORE,

*Of Counsel for Plaintiffs-in-Error.*

FILED

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WM. R. STANBURY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. AP-  
PLEBY, individually and as executors,  
etc.,

Plaintiffs-in-Error,

*against*

THE CITY OF NEW YORK, *et al.*,  
Defendants-in-Error.

## MEMORANDUM OF PLAINTIFFS-IN-ERROR IN REPLY.

On examining the brief for the defendants-in-error, we find no reason to modify or add to the arguments made in our principal brief, but we desire to refer briefly to some of the cases cited by counsel for the defendants-in-error which we think do not warrant the construction which he puts upon them.

In *Montgomery v. Portland*, 190 U. S. 89, there was no grant involved, but it was contended by a riparian owner that the Act of Congress of 1890 deprived the local authorities of all power in respect to the building of structures in the river (p. 104).

In *Greenleaf Lumber Company v. Garrison*, 237 U. S. 251, there was no question of any State grant but merely of the paramount right of Congress to fix a line.

Obviously, the statements in the opinions in the *Ice Company* cases in New York must be taken in relation to

the questions involved in those cases and cannot be regarded as overriding the rules established by a long line of authorities with respect to grants in fee simple.

Thus, in *Knickerbocker Ice Company v. Forty-second Street R. R. Company*, 176 N. Y. 408, the question was of a grant of a pier at the foot of Forty-third Street (p. 415). The grantee had actual knowledge of the covenants with respect to Forty-third Street which were contained in deeds to the adjoining property and he knew the public trusts upon which Forty-third Street was held by the City. The Court held that the grant in question was not one of a fee, but of a right to maintain a pier (p. 418). As to this, it was held that the plaintiff "had the right to follow the lawful extension of Forty-third Street for the purpose of maintaining a pier and collecting its revenues" (p. 419). The case did not involve the title to the lands adjacent to Forty-third Street, and there is nothing in the decision which detracts from the authorities that grants of land under water such as those here involved convey the absolute fee.

Further, in the subsequent case of *Matter of Mayor*, 193 N. Y. 503, where the same pier grant was involved as that in the case of the *Knickerbocker Ice Company*, *supra*, the Court held that the grant of "the right to maintain a pier and to collect wharfage, etc., at the foot of Forty-third Street" was a valid grant (p. 518), and that "that right cannot be destroyed without compensation" (p. 519). The Court said: "While the City clearly has the power to acquire this right or franchise owned by the ice company, the latter is quite as clearly entitled to compensation for being deprived of that right" (p. 520). But it held that it could not obtain the compensation in that proceeding. The same pier right in Forty-third Street was involved in the case of the *American Ice Company v. The City of New York*, 217 N. Y. 402, cited by counsel for defendants-in-error (the American Ice Company being the successor of

the Knickerbocker Ice Company), and the Court referred to its former holding that the plaintiff was "entitled to proper compensation for the taking of his right to maintain a pier" (p. 416), and said further: "We reiterate that the deed from the City to Lindsley conveyed to Lindsley the right to maintain a pier and to collect wharfage at the foot of Forty-third Street wherever that point should be located by the lawful authority, and that the plaintiff as successor to Lindsley had the right to follow the lawful extension of said pier on Forty-third Street for the purpose of maintaining the pier and collecting revenues therefrom" (p. 417). Thus, the Court re-affirmed the right of compensation (pp. 420, 421), and instead of the *Ice Company* cases constituting authority for the proposition that the benefit of the grants by the City may be taken away without compensation, they establish just the contrary and award compensation to the grantee for what was only a pier right in a street. None of the general remarks in the opinions detract from the force of this decision.

Another case cited by counsel for defendants-in-error is *Cox v. The State*, 144 N. Y. 396. The grant relied upon was in that case held in express terms to be in violation of the State Constitution, whereas grants of the sort made to the plaintiffs-in-error in the case at bar have been repeatedly held to be in accordance with the Constitution of the State.

In *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, the grant was made pursuant to the Act of 1813, which gave a naked title to the soil without any right to disturb the waters. There was no grant such as that authorized by the Act of 1837 extending the *ripa*, to make land, fill in and improve. The grant did not constitute an extinguishment of the *jus publicum*. In other words, the grant was entirely different in its scope and effect from what the grants of the plaintiffs-in-error have been held to be. There was nothing in that case which qualified the decision in *Duryea v. Mayor*, 62 N. Y. 592, decided a short time before by the

same Court composed of the same judges, who unanimously held that in the case of a grant like those here in question "the estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an absolute owner except as restricted by the covenants and reservations contained in it." This is the principle applicable here, sustained by the long line of cases to which we have referred in our principal brief.

In *Coffin v. Scott*, 19 Weekly Digest, 413, printed in the appendix to the brief of defendants-in-error, the question related to a pier at the foot of West Forty-fourth Street on land which was expressly excepted from the grant. As the Court said, "the pier is wholly built within the lines of the street and upon the land excepted from the grant" and "the plaintiff has no title or interest therein which entitles him to claim the ownership of such pier or to demand wharfage or rent for its use." While the plaintiff could not demand such wharfage on the pier within the lines of the street which was excepted from his grant, there was no question involved or denial of his right to fill in or to have piers or structures built by him under his grant within the limits of the property granted. In the present case, the plaintiffs-in-error are not seeking to get wharfage on the piers within the lines of the street, but to have the right to use their own property according to the terms of the grants and not in conflict with Federal authority, in order they might obtain the benefit of its use as agreed.

And to repeat, if there could be any possible doubt upon this point, it is resolved by the conclusions in the Decision and Judgment in this case explicitly setting forth the quality of the plaintiffs' title.

Respectfully submitted,

CHARLES E. HUGHES,  
BANTON MOORE,  
Counsel for Plaintiffs-in-Error.

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WM. R. STANS

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as executors, etc.,  
*Plaintiffs-in-Error,*  
*against*

THE CITY OF NEW YORK, *et al.*,  
*Defendants-in-Error.*

No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
*Plaintiffs-in-Error,*  
*against*

JOHN H. DELANEY, as Commissioner of Docks of  
The City of New York,  
*Defendants-in-Error.*

*In Error to the Supreme Court of the State of New York.*  
(235 N. Y. 351, 364; 199 App. Div. 539, 552.)

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**BRIEF FOR PLAINTIFFS-IN-ERROR ON  
REARGUMENT.**

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CHARLES E. HUGHES,  
BANTON MOORE,  
*Of Counsel for Plaintiffs-in-Error.*





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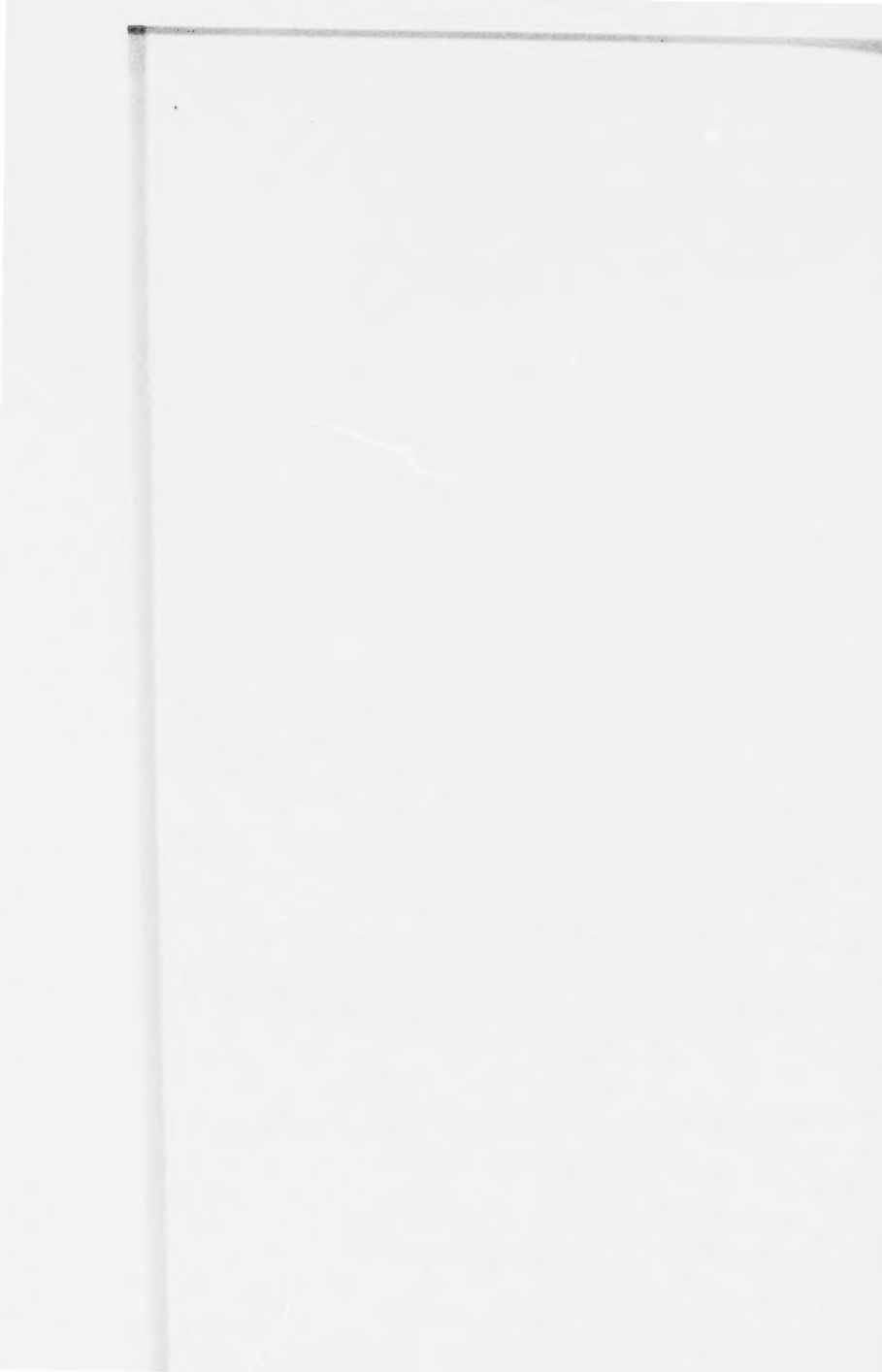
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1925.

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EDGAR S. APPLEBY and JOHN S.  
APPLEBY, individually and as execu-  
tors, etc.,

Plaintiffs-in-Error,

*against*

THE CITY OF NEW YORK, *et al.*,  
Defendants-in-Error.

---

No. 15.

---

EDGAR S. APPLEBY and JOHN S.  
APPLEBY,  
Plaintiffs-in-Error,

*against*

JOHN H. DELANEY, as Commissioner  
of Docks of the City of New York,  
Defendants-in-Error.

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No. 16.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
NEW YORK.

(235 N. Y. 351, 364; 199 App. Div. 539, 552.)

**BRIEF FOR PLAINTIFFS-IN-ERROR ON  
REARGUMENT.**

We shall not attempt to repeat the statement of facts or to re-traverse all the ground covered in our principal brief, but rather to seek to give appropriate emphasis to the points we believe to be controlling.

### Summary Statement.

The plaintiffs claim under grants from the City of New York of water lots on the Hudson River between 39th and 41st Streets and 12th and 13th Avenues. These grants, made in 1852 and 1853, conveyed the fee simple to the plaintiffs' predecessors in title. The land within the defined limits of 39th, 40th and 41st Streets, respectively, and within the limits of 12th and 13th Avenues, respectively, was retained by the City. By the terms of the grants, these streets and avenues were to be and remain public streets and avenues for free and common use (*Record*, No. 15, Ex. 4, p. 372, fol. 1114; Ex. 5, pp. 382, 383, fols. 1146-1147). Within the boundaries of the grant and outside the limits of the streets and avenues, the plaintiffs are the owners of the premises and are entitled to improve them. The plaintiffs under their grants are also entitled to the "wharfage, cranage, advantages or emoluments" accruing by or from that part of the exterior line of the City as defined lying on the westerly side of the granted premises, for their "own proper use and benefit forever" (*id.*, p. 374, fols. 1121, 1122; p. 385, fol. 1154).

Overriding the plaintiffs' rights, the City adopted different plans. The City built piers (which were extended streets) within the limits of 39th, 40th and 41st Streets; but instead of making these public streets or piers, the City leased them as proprietor for the exclusive use of their lessees. The City and its lessees treated the intervening spaces between the piers as appurtenant to the piers and made them basins or slips for the use of the piers. The City and its lessees treated these intervening spaces, although they were part of the granted premises, as their own and

the City dredged them out to facilitate their use for the benefit of the City and its lessees.

Meanwhile, the plaintiffs were heavily taxed for the property they could not enjoy and they have paid their taxes (*id.*, p. 200). The Federal bulkhead line of 1890 ran across their property, but so far as the Federal Government was concerned, the plaintiffs could still make solid filling inshore of this bulkhead line. Outside this line of solid filling, the plaintiffs, so far as the Federal Government was concerned, could still build open piled structures out to the line of their property, as the Secretary of War's pierhead line was far out beyond the westerly boundary of the plaintiffs' grants (*id.*, Finding 33, p. 182, fol. 544; Principal Brief for Plaintiffs in Error, pp. 60, 61; Original of Ex. C, p. 529, submitted on argument). But the City would not permit the plaintiffs either to fill in inshore of the bulkhead line of the Secretary of War or to pier out or build any sort of structure beyond that line and within the Secretary of War's pierhead line.

In preventing the plaintiffs from using their property, the City acted under the authority of legislation of the State subsequent to the grants, *i. e.*, under Chapter 763 of the Laws of 1857 and Chapter 574 of the Laws of 1871 and the provisions carried into the Greater New York Charter and its subsequent amendments. The Act of 1871 contemplated that the City in carrying out plans derogating from these grants of the water front property should re-acquire the title to such property by appropriate condemnation proceedings. It provided explicitly for such proceedings (Laws of 1871, Chap. 574, Sec. 4). Accordingly, in 1894, the City began condemnation proceedings to acquire the premises in question and commissioners were

appointed for that purpose (*Record*, No. 15, Findings 22-24, pp. 179, 180; Exs. 12a-15, pp. 397-417). Under cover of these proceedings, and while plaintiffs were debarred from improving their property (as they could not seek to increase the award in this way) the City proceeded to treat the premises as their own to be used beneficially for itself and its lessees and this situation continued until 1914 when the condemnation proceedings were discontinued by the City (*id.*)

Thereupon, in September, 1914, the suit of *Appleby v. The City of New York*, No. 15, was brought (*id.*, p. 8, fol. 24). This was a suit to procure a judgment establishing the title of the plaintiffs to the granted premises and to restrain the illegal encroachments of the City and its lessees. The State Court, whose judgment is under review, sustained the plaintiffs' title as a title in fee simple. The Court definitively determined that the City could not as the successor to the title of the State convey lands to private owners and retake the same by the exercise of the police power without making compensation therefor (*id.*, p. 568). The plan could not be carried out without re-acquiring the title which it (the State) has authorized the City to convey to private owners (*id.*, p. 569).

But the State Court, in No. 15, drew a distinction between the portion of the premises inshore of the Secretary of War's bulkhead line and the portion beyond that line. The plaintiffs have no quarrel with this so far as this bulkhead line is made the limit of solid filling. But as to the portion of the premises beyond that line of solid filling, the State Court was not content to maintain the Federal pierhead line which was beyond plaintiffs' westerly boundary. The State Court proceeded to give effect



to Chapter 763 of the Laws of 1857 and Chapter 574 of the Laws of 1871 as amended, and held that the plaintiffs could not erect "any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue", that is, between the said bulkhead line and the westerly boundary of plaintiffs' grants although this boundary was far inside of the Federal pier headline (*Record*, No. 15, pp. 550, 551).

We seek a review and reversal of this determination of the State Court upon the ground that the legislation thus made effective impaired the plaintiffs' contracts and deprived them of their property without due process of law, contrary to the Federal Constitution. The Federal questions were properly raised (*id.*, pp. 146-150), were litigated and determined. The judgment evidently proceeded upon a wrong construction of the action of the Secretary of War in establishing the Federal pierhead line. That action did not prevent open piled structures being built between the Federal bulkhead line and the Federal pierhead line. As to this measure of enjoyment of their premises the plaintiffs were not affected by the Federal action, and the State, and the City acting under its authority, were in this respect no more entitled to interfere with the plaintiffs' title and rights under the grants between the bulkhead line and the westerly boundary of the granted premises, than they were entitled to interfere with the plaintiffs' title and rights inshore of the bulkhead line.

In 1916, and while the suit No. 15 was pending, the City authorities adopted another plan under which the bulkhead line, or line of solid filling, was to be pulled further inshore. The plaintiffs having obtained a decision in No. 15 from

the court of first instance which measurably sustained the plaintiffs' title and property rights, sought to improve their property inshore the bulkhead line of the Secretary of War and applied for the usual permit from the municipal authorities, which is necessary in the case of practically all property within the City limits in order that suitable police regulations may be enforced. Their application was denied upon the ground that the municipal authorities had no power to grant it in view of the new plan of 1916. The plaintiffs then brought their proceeding for a *mandamus*. This proceeding is No. 16, *Appleby v. Delaney*. The *mandamus* was denied.

This determination gave effect to the City's plan of 1916, and the legislation under which it was adopted. We complain of that legislative deprivation of the plaintiffs' property rights and the impairment of the obligations of their grants. The Federal question was properly raised (*Record*, No. 16, pp. 10-11). The invocation of the municipal ordinance of 1844, requiring the permission of the City to fill in, cannot aid the City. It is for this court to construe the grants, when impairment of the contractual obligation is alleged, and we urge that the proper construction of the grants with reference to the ordinance does not give the arbitrary power to the City, for which it contends. The State Court is not at liberty to sustain subsequent legislation impairing grants by giving a forced and erroneous construction so as to permit the legislation to be effective. Otherwise, the State could make short work of the constitutional guarantee.

It should be observed that the City based its refusal to give the permit for the filling in inshore of the Federal

bulkhead line solely on the ground that under legislative authority it had adopted the new plan of 1916 making a new bulkhead line further inshore (*id.*, p. 35). This was the only defense presented in the City's answer in the *mandamus* proceeding (*id.*, p. 65).

The result is that the plaintiffs are wholly debarred from the enjoyment of the premises under their grants. Counsel for the City admits before this Court that his contention is that "the plaintiffs have merely a naked fee with respect to the lands in question. They may not devote them to any profitable use." (Former Brief for City of New York, p. 19). Apparently the only privilege vouchsafed to the plaintiffs is that of paying taxes. Manifestly this is not the intent or effect of the grants. We challenge the City's position as a bald assertion of a right in the State to destroy the obligation of the grants and to deprive the plaintiffs of their property without compensation.

### Outline of Argument.

Considering our principal brief as sufficiently presenting the facts, we shall discuss at this time the following questions, developing the points which have been briefly suggested in the above statement:

(1) With respect to No. 15, *Appleby v. City of New York*:

- (a) What was determined by the State Court?
- (b) The Federal question presented.
- (c) The effect of the Secretary of War's pierhead line and the rights of the plaintiffs under their grants with respect to the portion of the premises between the Secretary of War's bulkhead line and his pierhead line.

(2) With respect to No. 16, *Appleby v. Delancy*:

- (a) What was determined by the State Court?
- (b) The Federal question.
- (c) The true construction of the grants in the light of the ordinance invoked by the City.
- (d) The effect given by the State Court to the legislation impairing plaintiffs' grants.

## ARGUMENT.

### No. 15—*Appleby v. City of New York.*

*First. What was determined by the State Court?*

The plaintiffs' title, its quality, and the extent of the plaintiffs' rights were litigated and determined. The plaintiffs had no adequate remedy at law. They resorted to equity to restrain the illegal action of the City and its lessees, but their right to relief depended upon the establishment of their title and the nature and extent of their rights by virtue of their grants. Accordingly, in their complaint, they set forth their grants, their right to fill in the premises and make land, their right of wharfage, crannage and dockage, the various acts of the State legislature, the abortive condemnation proceedings, the attempts by the City to subject the plaintiffs' premises to the beneficial use of the City, and its lessees, as proprietors, contrary to the plaintiffs' rights of property, and the illegal encroachments of the City and its lessees. They asked for relief restraining these interferences. (*Record*, No. 15, Complaint, pp. 9-61.)

The City answered, putting in issue the allegations as to the plaintiffs' property rights (*id.*, pp. 62-75). Further, the City pleaded, as an affirmative defense, the State legislation of 1857 and 1871, the Secretary of War's action in fixing the bulkhead line, and alleged that after the adoption of the improvement plan of 1871 and the establishment of the bulkhead line, the plaintiffs and their predecessors in title were prohibited from filling in (*id.*, pp. 75-79). Under State practice, no reply was required.

The issues thus presented, and those actually litigated, related to the plaintiff's rights of property. This is shown by the plaintiff's proposed findings (*id.*, pp. 111-150) and the City's proposed findings (*id.*, pp. 151-170). Both parties asked detailed findings according to their conception of the plaintiffs' title and property rights, and the effect of the legislation subsequent to the grants. The plaintiffs duly raised their Federal questions as to this legislation (*id.*, Plaintiffs' Proposed Additional Findings, Nos. 22-31, pp. 146-150).

Not only were the issues as to the plaintiffs' property rights actually litigated, they were determined. The plaintiffs' grants were construed and the effect of the subsequent legislation passed upon. What was thus determined by the trial court is shown in its formal *Decision* setting forth the facts found and the conclusions of law (*id.*, pp. 171-199). The judgment recited and rested upon this decision which was required by law and which directed the judgment (*id.*, pp. 201-202). The judgment enjoined the City and its lessees "from excavating, dredging or removing the soil of plaintiffs' said premises" and directed the City "to take down and remove the overhanging dumping board or platform now erected on the northerly side of the pier in West 39th Street" (*id.*, p. 202). This relief was predicated on the conclusions as to plaintiff's title and property rights. Is it not clear that if the suit had stopped there, the decision and judgment would have constituted a final adjudication upon the question of plaintiffs' property rights in the premises in question, which had thus been actually litigated and determined?

There need be no uncertainty as to the New York practice. The present Civil Practice Act of New York went into

effect on October 1, 1921 (Civ. Prac. Act, sec. 1578). So far as the present questions are concerned, the practice under this Act and the previous Code of Civil Procedure is the same. On a trial before the Court without a jury, as in No. 15, the Court renders a decision. This decision must state separately the facts found and the conclusions of law and direct the judgment to be entered thereon and this decision so filed shall form part of the judgment roll (Code Civ. Pro., sec. 1022; Civ. Prac. Act, sec. 440). Before the cause is finally submitted, either party may submit in writing a statement of the facts which he deems to be established and the rulings upon questions of law which he desires the court to make. The court passes upon these requests. Exceptions may be taken to a refusal of the court to find any requests thus presented (Code Civ. Pro., sec. 1023; Civ. Prac. Act, sec. 439). This practice has the advantage of showing precisely what has been determined in fact and law, and the parties and reviewing courts are not compelled to extract the determination from the possible ambiguities of an opinion.

Appeal may be taken to the Appellate Division. Upon such an appeal, the Appellate Division has full power to review the law and the facts and may reverse or affirm or modify the judgment and may make new findings to sustain the judgment it awards (Code Civ. Pro., sec. 1317; former Supreme Court Rule 34; Civ. Prac. Act, sec. 584; present Rule 239).

In the instant case, both parties appealed to the Appellate Division and that court modified the judgment and made new findings which it incorporated in its order and judgment. Except as thus modified and added to, the findings and conclusions of the trial court were expressly af-

firmed (*Record*, No. 15, pp. 549-551). The Appellate Division left no doubt as to what it considered the issues to be or as to its disposition of them under its broad powers. The court stated that the questions to be determined were those of the plaintiffs' title and property rights. Thus, the court said in its opinion, that "the first point of law to be decided arises upon the contention of the plaintiffs that, by these grants, the fee simple absolute passed to the grantees, subject only to an easement reserved to the public for the streets and avenues" (*id.*, p. 556). The court then went into an elaborate consideration of the grants and the title and rights established thereby. The court held that "these were beneficial grants; that so far as the State and City were concerned, and subject only to the control of the United States over navigable waters, the grantees from the City acquired an absolute title to fill in the premises granted between the street and avenue lines, but not to make the streets, avenues, bulkhead and wharves until called upon by the City so to do or until the City approved plans therefor, and thenceforth any and all rights of the State and City to claim that any of the waters within the lines of the premises so granted were navigable were abandoned" (*id.*, pp. 556-557). The court reviewed the decisions and distinguished such cases as that of the *Knickerbocker Ice Company*, 176 N. Y. 408, and other cases cited, upon the ground that "they were not inconsistent with the right of the City to grant a fee for a valuable consideration to a riparian owner of land under water at the edge of a navigable stream not deemed necessary for navigation" (*id.*, p. 557). The court held that the grants having given to the grantees "the right to construct bulkheads on the water front of the lands granted, and to collect wharfage and crannage in perpetu-



ity" they could not be deprived of those rights without compensation, "and therefore they have the right to erect a bulkhead and wharf on the new bulkhead line so established by the Secretary of War, since that is the furthest west that such bulkhead may lawfully be constructed, and to exercise their rights with respect thereto" (*id.*, p. 561). But the court denied the contention of the plaintiffs as to their right to erect piers from the bulkhead line over their premises and within the Federal pierhead line, giving effect, wrongly as we contend, to the laws of 1857 and 1871 and the provisions of the Greater New York Charter because of an erroneous view of the effect of the Federal action in locating the pierhead line (*id.*, p. 561).

The relief to which the court thought the plaintiffs were entitled followed its determination as to the plaintiffs' title and property rights. Thus the court sustained the judgment with regard to the projection over plaintiffs' premises, "the overhanging dumping board or platform," upon the ground that this constituted trespass which might ripen into a prescriptive right and if in the future such projections "should interfere with the plaintiffs' wharfage and craning rights, a prescriptive right to maintain them might be asserted by the City" (*id.*, p. 562). The court maintained the judgment preventing dredging inshore of the Federal bulkhead line. In view of the court's views as to the effect of the State legislation and Federal action upon the plaintiffs' rights beyond the bulkhead line, the court decided that the judgment should be modified by eliminating the provision which enjoined the dredging of the slips westerly of that line.

Not content with an elaborate opinion, the Appellate Division took the trouble to draw up a set of additional

conclusions of law (*id.*, pp. 550, 551) specifically setting forth the authority of the City to make the grants, the nature and extent of plaintiffs' rights of property, and the effect of the subsequent State legislation and of the Federal action. With respect to the validity of the grants as being in fee simple and constituting contracts which could not thereafter be impaired by State legislation, and subject only to the power of the Federal Government to regulate commerce, the Court set forth the following explicit conclusions (*id.*, p. 550):

"26. The Legislature of this State extinguished the '*jus publicum*' in the lands under water granted to plaintiffs' predecessors in title and such grants are irrevocable and inviolable.

"27. Chapter 182 of the Laws of 1837 vested in the Mayor, Aldermen and Commonalty of the City of New York the entire and absolute right and title of the State to lands under water between the Streets and Avenues, and also gave said City power and authority to convey the absolute right and title of said premises to the owners and the adjacent upland, subject only to the power of the Federal Government to regulate commerce.

"31. The deeds by the City in the years 1853-1854 to Appleby and Latou, respectively, for a valuable consideration and certain covenants and agreements therein contained, formed valid contracts which could not thereafter be impaired by subsequent legislation of the State of New York without compensation."

With respect to the rights of the plaintiffs to fill in and make dry land of the premises *inshore* of the bulkhead line, and with respect to the ineffectiveness of the attempt of

the City to change the bulkhead line through the action taken in 1916, the Court found as follows (*id.*, p. 550):

“28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890.

“29. The action of the Commissioner of Docks in changing the bulkhead line with the approval of the Commissioners of the Sinking Fund in 1916 does not impair or destroy the property and rights of the plaintiff.

“30. Said action of the Dock Commissioners with the approval of the Commissioners of the Sinking Fund, does not prohibit the plaintiffs from filling in said premises out to the bulkhead line established by the Secretary of War.”

But with respect to the premises which lay *outshore* of the bulkhead line, that is, between the Secretary of War's bulkhead line and the westerly boundary of the plaintiff's grants, although far within the Secretary of War's pierhead line, the Court set forth the following conclusion (*id.*, p. 550):

“32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and through the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right

to regulate the construction of docks, piers, and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

It is the practice in New York to enter a judgment of the Supreme Court in the County Clerk's office upon the Order and Judgment of the Appellate Division and this was done (*id.*, pp. 551-552). This judgment (*id.*, p. 551) recited the order of the Appellate Division dated January 20, 1922 (*id.*, p. 549), which set forth the above conclusions of law, and it was upon this order and judgment of the Appellate Division that the judgment entered in the County Clerk's office rested.

It is manifest that had the litigation stopped at this point, there would have been a final adjudication upon the points set forth in the determination of the Appellate Division as to the plaintiffs' title and property rights. The conclusions above quoted were not incidental or aside from the issues. They were vital, dealing definitely with the issues as actually litigated, and the judgment rested upon the

determination of these issues. How could there be a clearer or more formal statement of what was litigated and determined?

It is elementary that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies" (*Southern Pacific R. R. Co. v. U. S.*, 168 U. S. 1, 48, 49). Such an adjudication is just as binding as to the conclusions of law upon which the determination rests as with respect to matters of fact.

"The law once laid down upon a specified state of facts is binding upon the parties to the controversy and their privies for all time."

*City of New York v. New York City Ry. Co.*, 193 N. Y. 543, 551.

See also

*Williamsburgh Savings Bank v. Town of Solon*, 136 N. Y. 465, 476.

*Young v. Farwell*, 165 N. Y. 341, 345, 346.

It makes no difference that the adjudication is in a suit in equity.

*Young v. Farwell*, 165 N. Y. 341, 345, 346.

Plaintiffs appealed to the Court of Appeals from the order and judgment of modification and affirmance entered by the Appellate Division and from the judgment entered thereon (*Record*, No. 15, p. 553). The City also appealed from that portion of the judgment of the Appellate Division which affirmed the injunction against the dredging in-shore of the Secretary of War's bulkhead line (*id.*, p. 552).

The Court of Appeals affirmed the judgment of the *Appellate Division* (*id.*, pp. *a*, *b*, and *c*, at beginning of Record).

The jurisdiction of the Court of Appeals was limited to the review of questions of law (New York Constitution, Art. VI. Sec. 9). (This provision was changed by a constitutional amendment adopted at the last election, in November, 1925, but the provision governed the proceedings in the present case.)

As the findings of fact had been unanimously affirmed by the Appellate Division, the only questions before the Court of Appeals were whether the findings of fact sustained the conclusions of law and whether these conclusions supported the judgment.

*Matter of Keefe*, 164 N. Y. 352, 354;

*Acme Realty Co. v. Schinasi*, 215 N. Y. 495, 501;

*Hartley v. Eagle Insurance Co.*, 222 N. Y. 178,  
182;

*Appleton v. City of New York*, 219 N. Y. 150, 158;

*Tierney v. Dowd*, 238 N. Y. 282, 285.

In *Matter of Keefe*, *supra*, the Court of Appeals laid down the following rule:

“This court recently, after reviewing a large number of cases, has laid down the rule that when the Appellate Division reverses on the law we have but three questions open to us here, viz: The correctness of the rulings as to the admission and rejection of evidence; whether any material finding of fact is without evidence to support it, and whether the conclusions of law are supported by the facts found (*National Harrow Co. v. Bement & Sons*, 163 N. Y. 505, 508).”

In *Appleton v. City of New York*, *supra*, the same court said:

“The Special Term by its findings of fact and conclusions of law sustained the assertions of the plaintiffs. The Appellate Division, by the findings of fact as determined by it, and legal conclusions based upon them sustained the assertions of the defendant, and reversed any finding of fact made by the Special Term inconsistent with the findings made by it. In case the new findings of fact made by the Appellate Division have support in the evidence, we must, inasmuch as its legal conclusions are upheld by the facts as found, affirm its decision (*Union Trust Co. of Rochester v. Oliver*, 214 N. Y. 517, 522).”

In the recent case of *Tierney v. Dowd*, *supra*, it was said by the Court of Appeals:

“The trial justice has consequently made no findings in favor of the plaintiff on these points, but has rendered a decision in favor of the plaintiff based on evidence presented and findings made, intended to bring this case within the prohibition of the first sentence of the statute quoted above. The unanimous affirmance of these findings leaves open for review here only the question of whether these findings sustain the conclusions of law.”

In the instant case, while the opinion of the Court of Appeals is not altogether clear, we think that it is demonstrable that it did not reverse or disapprove the conclusions of law reached by the Appellate Division.

The Court of Appeals showed that the questions before it turned upon the construction and effect of the plaintiffs’

grants, the quality of their title and the extent of their rights of property (*Record*, No. 15, p. 566). At the beginning of the opinion the court recognized this in saying: "This is an action to restrain the City of New York and other defendants from interfering in any way with the use and enjoyment of plaintiffs' land under the water of the Hudson River between Thirty-ninth and Fortieth streets and between Fortieth and Forty-second streets, outshore of Twelfth Avenue" (*id.*, p. 568). The court then stated the source of title, the course of the State legislation and the establishment of the Secretary of War's line (*id.*, pp. 566, 567). The court then stated the question involved in the litigation as follows (*id.*, p. 567):

"The question is as to what extent has the City by its grants extinguished the *jus publicum* over such lands."

It is evident that in considering this question the Court of Appeals deemed it to have two phases; one with respect to the premises *inshore* of the Secretary of War's bulkhead line, and the other as to the premises *outshore* of that line. If this distinction is kept in mind, it is believed that any ambiguities in the opinion will be cleared up.

The Court of Appeals in its remarks with regard to the rights of the public, in that part of the opinion which immediately follows its statement of the question in issue as above quoted, had particularly in mind the premises lying *outshore* of the Secretary of War's bulkhead line. Thus, after its preliminary statement, the court says (*id.*, p. 567):

"When the Secretary of War established the bulkhead line, the title of the state, the city and its



grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it (*Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82). Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The City of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs."

It is apparent that this ruling is in accord with the determination of the Appellate Division as set forth in its Conclusion No. 32 (*id.*, p. 550).

Having reached this conclusion that the plaintiffs could not fill in any portion of their land *outshore* of the Secretary of War's bulkhead line and that the City could proceed with its plans with respect to the portion of the premises lying beyond that line, the Court of Appeals then proceeded to deal with the remaining question relating to the premises *inshore* of the Secretary of War's bulkhead line. The Court starts its discussion of this branch of the case with the statement (*id.*, p. 568):

"But the United States acts as sovereign and the state of New York acts also as proprietor. The authority of the state in its governmental capacity over the waters of the Hudson within its limits is plenary, subject only to such action as Congress may take. (*Montgomery v. Portland*, 190 U. S. 80, *Matter of Public Service Commission*, 224 N. Y. 211.) It might have improved the water front itself. It

had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips."

Then, after stating that so long as the lands remained under water they were subject to the sovereign power of the State to regulate their use for the purpose of navigation, and that the State had delegated such power to the City, the Court distinctly held that the City could not "as the successor to the title of the state, convey lands under waters to private owners *and retake the same by the exercise of the police power without making compensation therefor*" (*id.*, p. 568; italics ours). The general discussion that follows this statement cannot be regarded as in any way detracting therefrom, for the Court concludes its opinion with an explicit reaffirmation of the proposition that the title of the plaintiffs could not be divested without compensation and that the plan of the State as sovereign could not be carried out without re-acquiring the title which it had authorized the City to convey to private owners. The Court said (*id.*, p. 569):

"The right of the grantee to fill in his land under water with solid filling (*Duryea v. Mayor*, 62 N. Y. 592, 597; 96 N. Y. 477, 496) is a delegated exercise of the public right in aid of commerce and subject to the prior exercise of the public right to regulate navigation directly. The grant for beneficial enjoyment is a grant in aid of commerce. *But such grant having once been made, titles traced back to the state as proprietor may not be divested by such regulations, without compensation.*

*The grant to plaintiffs being a property right which can be resumed by the city only on payment of compensation, was a grant of all the title the city had to convey. The right of the public was not thereby distinguished. The city had the right to dredge out all the lands under water between the piers to promote navigation. The establishment of the bulkhead line does not conflict with the right of the city in the execution of an authorized plan of harbor improvement to construct slips between the piers, but the plan of the sovereign may not be carried out without re-acquiring the title which it has authorized the city to convey to private owners.” (Italics ours.)*

Thus it appears that, not only did the Court of Appeals not overrule the conclusions of law of the Appellate Division or express disapproval of them, but it distinctly approved them. With respect to the premises *outshore* of the Secretary of War's bulkhead line, the Court explicitly sustained the position of the Appellate Division and with respect to the premises *inshore* of the bulkhead line, the Court of Appeals just as clearly held that the State had authorized the conveyance by the City to private owners and that these conveyances, that is, the plaintiffs' grants, could not be impaired without compensation, and that there could be no retaking of the property by the exercise of the police power without making compensation therefor.

In view of the explicit holding of the Court of Appeals that the grant to the plaintiffs was “a property right” which could be “resumed by the City only on payment of compensation”; that it “was a grant of all the title the City had to convey”; and that a conflicting plan of the sovereign might “not be carried out without reacquiring

the title" which it had "authorized the City to convey to private owners"; (*Record*, No. 15, p. 569), it is not necessary to review at length the cases which counsel for the City invoked on the former argument. These cases do not in any way impair the authority of the decisions of the Court of Appeals holding that under conveyances of the character here in question, title in fee simple,—all the title that the City could convey,—passed to the grantees.

In *Knickerbocker Ice Co. v. Forty-second Street R. R. Co.*, 176 N. Y. 408, the grant was of a right to maintain a pier at the foot of Forty-third Street. The Court held that the fee was not conveyed. The grantee had actual knowledge of the covenants with respect to Forty-third Street which were contained in the deeds to the adjoining property, and he knew the public trusts upon which Forty-second Street was held by the City. The case did not involve the title to lands adjacent to Forty-third Street.

In *Matter of Mayor*, 193 N. Y. 503, the same pier grant was involved, and the Court held that even as to that grant, it could not be destroyed without compensation (*id.*, p. 519). The Court said:

"Conceding, for the purposes of this discussion, that the ice company has now no pier at the foot of Forty-third Street, it still retains the right to maintain a pier at that point, and that right cannot be destroyed without compensation."

But it was held that the "ice company franchises" could only be acquired by the City "in a separate proceeding brought for that purpose" (*id.*, p. 520).

The same pier right in Forty-third Street was involved in the case of *American Ice Co. v. City of New York*, 217 N. Y. 402 (the American Ice Company being the successor

of the Knickerbocker Ice Company) and the Court referred to its former holding that the plaintiff was entitled "to a proper compensation for the taking of his right to maintain a pier" (p. 417). The Court said further:

"We reiterate that the deed from the City to Lindsley conveyed to Lindsley the right to maintain a pier and to collect wharfage at the foot of Forty-third Street wherever that point should be located by the lawful authority, and that the plaintiff as successor to Lindsley had the right to follow the lawful extension of said pier on Forty-third Street for the purpose of maintaining the pier and collecting revenues therefrom" (p. 417).

Instead of the *Ice Company* cases constituting authority for the proposition that the benefit of grant by the City may be taken away without compensation, they establish the contrary and award compensation to the grantee for what was only a pier right in a street. The Appellate Division in the instant case, No. 15 (p. 557) referred to these cases and held that they were in no way inconsistent with the established rule that the State had authority to grant a fee for a valuable consideration to a riparian owner of land under water at the edge of a navigable stream and that conveyances of the sort in question here conveyed the fee.

It should be borne in mind that conveyances of this sort, that is, of water lots along the shore in the intermediate spaces between streets, are grants of a well-known character upon which rest titles of the greatest value. They have been taken and paid for in good faith for generations and it is proper to say that the courts of the State of New York have never impugned them. As has been said, the

Court of Appeals in this very case, sustains the title of the plaintiffs inshore of the Federal bulkhead line completely (*Record*, No. 15, pp. 568, 569). The question with regard to the premises outskore of that line, we shall presently consider and we believe it to be plain that the ruling of the court as to that portion of the premises was due entirely to an erroneous construction of the Federal action in establishing a bulkhead line. But on the main question as to the quality and effect of the plaintiffs' deeds as against the State and City, we consider it to be remarkable that the City's counsel should attempt in any way to derogate from the decisions of the State Courts which have sustained the titles acquired under grants of this description as being in fee simple and of the benefits of which the grantees could not be deprived without compensation.

In *People v. New York & Staten Island Ferry Co.*, 68 N. Y. 71, another case cited by counsel for the City, the grant was made pursuant to the Act of 1813, which was quite distinct in the nature of the authority granted to the City, from the Act of 1837. The latter Act extended the *ripa*, to make land, fill in and improve. There was nothing in the decision in the *Staten Island Ferry* case which qualified that in *Duryea v. the Mayor*, 62 N. Y. 592, decided but a short time before by the same court, composed of the same judges. In the *Duryea* case the court held that in the case of a conveyance like those here in question "the estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an absolute owner except as restricted by the covenants and restrictions contained in it".

The counsel for the City has also cited *Coxe v. the State*, 144 N. Y. 396, which was a grant by the Legislature beyond

the limits of its powers distinctly held to be in conflict with the Constitution, whereas in the present case, and in many other cases, grants of this limited and reasonable character along the shore have been held to be in accordance with the Constitution of the State. The Act of the Legislature in the *Coxe* case attempted to empower a corporation to become vested with the title to such portions of lands under the waters of the sea and the sound as it chose to designate within the limits of Kings, Queens, Richmond and Suffolk except the City of Brooklyn. While the Court held this grant to be invalid under the State Constitution, it distinctly recognized the propriety of conveyances of the class here under consideration. The Court said (*id.*, p. 407):

“Such a grant, therefore, can never constitute a contract between the state and the grantee which is beyond the power of revocation by a subsequent legislature. For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the city of New York of the lands under water below the shore line around Manhattan Island clearly comes within this principle, since it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city, and consequently of the people of the state. (*Langdon v. Mayor, etc.*, 93 N. Y. 129.) So, also, grants to railroads for rights of way and other facilities for the transaction of their business, made under the authority of the state, have been held valid upon the same principle (*Saunders’ Case, supra*), as well as to corporations and private persons engaged in com-

merce or navigation for their necessary or reasonable use. Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the state may lawfully apply such lands."

In *Matter of Long Sault Development Co.*, 212 N. Y. 1, the Court said at p. 8:

"The power of the legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question at this late day."

In that case, the grant was found to be unreasonable in its extent. There can be no question of unreasonableness in the deeds in the present case, which involved merely the extension of the *ripa* along the mud flats which bordered the shore. Grants of this kind to private persons have not only been recognized repeatedly as reasonable, but they were essential to the development of the City. The power of the Legislature to provide for these grants was recognized in the *Knickerbocker Ice Co.* case, 176 N. Y., at p. 413, and the *American Ice Co.* case, 217 N. Y., at p. 405. The Court in the *Long Sault* case, *supra*, refers to the early case of *Lansing v. Smith*, 4 Wend. 9, which clearly recognized this power. And to the case of *Langdon v. Mayor*, 93 N. Y. 129, which recognized the power and said that a "constitutional barrier stands in the way" of an appropriation without compensation, of a right acquired by these grants (93 N. Y. 161).

In *People v. Steeplechase Park Co.*, 218 N. Y. 459, the



question related to a grant of land under water at Coney Island. The Court said (p. 479):

“During all our history the legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction.”

Nor do the decisions of this court in any way conflict with the construction of the conveyances for which we contend and which they have received from the New York decisions.

In *Montgomery v. Portland*, 190 U. S. 89, there was no grant involved, but it was contended by the riparian owner that the Act of Congress of 1890 deprived the local authorities of power in respect to the buildings and structures in the river (*id.*, p. 104).

In *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, there was no question of any State grant but merely of the paramount right of Congress to fix a line.

There is nothing in the instant case which involves the question decided in *Philadelphia v. Stimson*, 223 U. S. 605.

The plaintiffs in error are not seeking by virtue of their grants to maintain any right or title in opposition to

the Federal Government. They, of course, recognize the Federal bulkhead line; likewise the Federal pierhead line. The question is as to the rights they may exercise consistently with the Federal action. And upon this point, the plaintiffs point to the series of State decisions which establish conclusively that conveyances of the sort here in question pass title in fee.

*Duryea v. Mayor*, 62 N. Y. 592.

*Langdon v. Mayor*, 93 N. Y. 129.

*Duryea v. Mayor*, 96 N. Y. 477.

*Williams v. Mayor*, 105 N. Y. 419.

*Mayor v. Law*, 125 N. Y. 380.

The decisions are cited and quoted from *infra*, in the part of our argument dealing with the questions raised in No. 16.

The counsel for the City makes an attempt to distinguish these cases, establishing the rule for which we contend, upon the ground that, in some of them, the land conveyed had already been filled in. That attempt meets an immediate answer in the decision of the Court of Appeals in the present case. The lands of the plaintiffs in error had not yet been filled in, for the reasons we have stated, inshore of the Federal bulkhead line, and yet the Court of Appeals has held explicitly that inshore of that line the plaintiffs have title in fee which cannot be retaken by the City without compensation. Plainly, then, the rights of the plaintiffs do not depend upon filling in and that is no ground for distinguishing the cases we have cited. Deeds of land under water, of the sort here in question, for which value has been paid, conveying premises in fee upon which the owners are taxed, are not made at the

peril of destruction the day after their execution because the premises have not been filled in. The conveyances, as repeatedly stated by the Court of Appeals, and as reiterated in the instant case, are grants of the fee with right to fill in. The City cannot take the money for grants of this sort and then repudiate the title. If the City desires to reacquire the title and to make new plans of water-front improvement, the City should purchase or condemn. The Court of Appeals in this case has denied the right of the State, and of the City, acting under its authority, to establish a bulkhead line inside of the Federal bulkhead line without paying compensation to the plaintiffs. Of what avail then is it to attempt to invoke expressions of the Court of Appeals in other cases, directed to other points, in the face of this decision upon the precise question? Why cannot the City, as the Court of Appeals holds it cannot, establish a new bulkhead line inshore of the Federal bulkhead line? If the statement in the Ice Company cases, and other cases cited by counsel for the City are to be taken to mean that the deeds of the City of the sort here in question did not convey a fee, and that the State and the City acting under its authority can, despite such conveyances, regulate the water-front as they please, then certainly the Appellate Division and the Court of Appeals would not have held that there could be no retaking of the title inside of the Federal line without making just compensation.

That this is the correct view of the decision was admitted by counsel for the City in its brief No. 15 upon the former argument in this Court in which it is stated, referring to the result in No. 15:

“The Courts of New York have restrained the City and the other defendants from interfering with

the plaintiffs' rights inshore of the bulkhead line (R. pp. 551-552) and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line" (*Former brief for defendant in error, City of New York, in No. 15, p. 9*).

While we have good ground for objecting to this statement so far as the adequacy of relief awarded is concerned, *it is a perfectly clear, as well as a necessary, admission as to what the State Court decided in No. 15.*

It is idle, therefore, for counsel for the City to attempt to find in any expressions in the opinion of the Court of Appeals a basis for any argument derogating from the plaintiffs' title and right to fill in the premises in question *inshore* of the Secretary of War's bulkhead line. What the Court of Appeals itself said, as above quoted, would be sufficient upon this point, as well as the fact of its affirmance of the judgment below. The Court of Appeals, like other courts has had frequent occasion to criticize efforts to attribute to expressions in its opinion an effect which would override or change the points actually decided.

In *Colonial City T. Co. v. Kingston R. R. Co.*, 154 N. Y. 493, 495, the Court said:

"If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the *dicta* of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is revelant, and when it wanders from the point at issue it no longer has force as an official utterance. The failure to read the opinions of courts with this fact in mind gives rise to much fruitless litigation."

See also,

*Stokes v. Stokes*, 155 N. Y. 581, 594.

*Ingersoll v. Nassau Electric R. R. Co.*, 157 N. Y. 453, 457.

*Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 551.

*People ex rel. McLaughlin v. Police Comrs.*, 174 N. Y. 450, 466.

And in *Craue v. Bennett*, 177 N. Y. 106, 112, the caution was repeated in these words:

“It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wrestling it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result. Therefore, in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. When this rule is followed, much of the misapprehension and uncertainty that often arises as to the effect of a decision will be practically avoided.”

In No. 15, the Court of Appeals had before it the explicit conclusions of the Appellate Division which sustained its judgment and the Court of Appeals directed **affirmance** without modification. Its somewhat discursive statements in its opinion does not impair or obscure the actual decision.

The ruling, and the opinion itself, properly interpreted, fully confirmed the Appellate Division and gave us the result which counsel for the City explicitly asserted in the statement we have quoted from the City's former brief.

*Second. The Federal question presented.*

The Federal question is presented by Conclusion 32 of the Appellate Division (*Record*, No. 15, pp. 550-551), the ruling approved by the Court of Appeals whose determination denying plaintiffs' rights in the part of the premises covered by their grants outshore of the bulkhead line (*id.*, pp. 567, 568). The plaintiffs' constitutional rights under the contract and due process clauses of the Federal Constitution were appropriately raised (*Record*, No. 15, Plaintiffs Proposed Additional Findings, Nos. 22-31; pp. 146-150; 221, 287) as against the State legislation thus sustained. These constitutional questions were insisted upon from the beginning to the end of the litigation in the State Courts. There can be no dispute as to this.

The conclusion of the Appellate Division was:

"32. The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and though the Federal Government established a pierhead line further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers, and wharves between said bulkhead and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet

of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th Avenue."

The ruling of the Court of Appeals was to the same effect, as appears from the following statements in its opinion, which we may again quote (*id.*, pp. 567-568):

"When the Secretary of War established the bulkhead line, the title of the state, the city and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it. (*Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82.) Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The city of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs."

This ruling of the State courts, both in terms and in substance, gave effect to State legislation subsequent to plaintiff's grants. It makes no difference that the State courts

thought this result could be based on the Federal action in fixing the bulkhead line. It was the State legislation, and not the Federal action, that prevented the plaintiffs from building piers on their premises out from the bulkhead line to the boundary of their property. As stated by the Appellate Division, it was Chapter 763 of the Laws of New York, of 1857, that provided that no pier should be erected within one hundred feet of another pier, and it was Chapter 574 of the Laws of 1871, as supplemented and amended, that authorized the city of New York to adopt a plan for water front which included the erection of piers. The city of New York, in the execution of its plans, to which the Court of Appeals referred, for the improvement of the water front westerly of the bulkhead line, acted under legislation of the State, and the City's plan itself was legislative in character. The result of this legislative action, to which the decision of the State court gave effect is, as explicitly stated, that the plaintiffs are prevented "from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the secretary of war and 13th Avenue" (*id.*, pp. 550-551).

There can be no question but that this State legislation, subsequent to the grants, impaired the obligation of the grants. The granted premises extended to the described boundary at Thirteenth Avenue, as originally planned. These grants, as the State courts have held, were for beneficial enjoyment. The Court of Appeals, in its opinion, called attention to the fact that "Great cities have been built up by grants of land under water" and that "The city of New York has been similarly developed by extending it over submerged lands" (*id.*, p. 568). In making these beneficial grants and thus extending the *ripari*, no interference



with navigation was proposed. The purpose was to develop the water front. The Court of Appeals put the matter succinctly in saying that the State "might have improved the water front itself. It had, however, granted all its title to the premises to the city of New York. The city might, in turn, have improved the water front, but it conveyed all its title to the plaintiffs in order to develop the commerce of the port by the construction of wharves, piers and slips" (*id.*, p. 568). The grant to the plaintiff "was a grant of all the title the city had to convey" (*id.*, 569).

There was nothing in the plaintiffs' grants requiring that piers should be one hundred feet distant from each other, as was subsequently provided by the State legislation of 1857. There was nothing in the plaintiffs' grants that "prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises" outshore the line which was subsequently fixed as the bulkhead line. The grants made no distinction as to the rights of the plaintiffs with respect to any particular portion of the premises granted, as all these premises lay between the streets and avenues. So far as the State and city were concerned the plaintiffs had the same rights in one part of the premises as in another, and the plaintiffs had also the right to take wharfage, crantage, etc., on the westerly side of the premises granted. So far as the State was concerned, it had no right, after these grants for beneficial enjoyment, to impair the plaintiffs' right in any part within the limits of the premises granted. The State courts have held in this case, both in the Appellate Division and the Court of Appeals, that within the bulkhead line the State and the city had no power to prevent the plaintiffs from enjoying the benefit of their property. The State, it was said, could not

retake the property or deprive the plaintiffs of their property rights or those advantages for which the grants stipulated except upon making just compensation. The grants did not stop at the line subsequently fixed by the bulkhead line. So far as the State and city are concerned, the plaintiffs had just as complete title to their premises beyond this line as within it. The State legislation, to which the decision below gave effect, impaired the plaintiffs' grants as effectively *outshore* of the bulkhead line as legislation would have impaired them in preventing the use of their property *inshore* of the bulkhead line.

The sole question, then, is not whether effect has been given to the State legislation subsequent to the grants, or whether this legislation impairs the obligation of the grants, but whether this impairment is required or justified by the Federal action which has been invoked to sustain it.

*Third. The effect of the Secretary of War's pierhead line and the rights of the plaintiffs under their grants with respect to the portion of the premises between the Secretary of War's bulkhead line and his pierhead line.*

It is apparent from the decision of the State Court in No. 15 sustaining the rights of the plaintiffs inshore of the Federal bulkhead line, that this line derives its controlling character from the fact that it was established by Federal action. Had there been no Federal action fixing a line of solid filling, the plaintiffs, according to the decision of the State Court, would have been entitled to the complete use of the granted premises as provided in the grants and the city could not have deprived them of this use without compensation.

The question then is reduced to this: What was the scope and effect of the Federal action?

The fixing of the bulkhead line by the Secretary of War cannot be made to do duty for more than this action determined. The bulkhead line thus became the line of solid filling. It is recognized as such. It created no rights in the State and the city with respect to the remainder of the plaintiffs' premises *outshore* the bulkhead line save that these premises should not be solidly filled in.

The plaintiffs retained all their rights of property that could be exercised consistently with the Federal action in establishing a bulkhead line. We submit that the State Court is in error in holding that this action subordinated the use of the premises to the requirements of navigation in any way that the State and city might see fit, regardless of the provisions of the grants. The fixing of the bulkhead line did not subject the plaintiffs' premises to the uses of navigation except to the extent that the premises could not be solidly filled in. Nothing else was determined by the establishment of the bulkhead line.

The fact that there might be uses of the premises by building piers, wharves and other structures not requiring a solid filling, is conclusively shown by the Secretary of War's action in establishing a pierhead line,—that is, a line to which piers might extend, and it is undisputed that the Secretary of War's pierhead line lay far out beyond the boundary of the plaintiffs' premises. There was nothing in the Secretary of War's action either as to the bulkhead line or as to the pierhead line which prevented the use of the plaintiffs' premises between the bulkhead line and the boundary of those premises for the purposes of piers. If the pierhead line was to be the limit of the piers, obviously there could be piers within that limit.

Upon the former argument we produced the original of Exhibit "C", the Secretary of War's map, an authenticated document of the Federal Government. We called attention to the fact that it bore this notation:

*"The bulkhead line defines the limit for solid filling; the pierhead line, the limit to which open piled structures may be built"* (italics ours).

So far then as Federal action is concerned, open piled structures could be built on the plaintiffs' premises between the Federal bulkhead line and the westerly boundary of those premises. The question then is: Who has the right to build these structures? The city gave all the right it had to the plaintiffs, and they by virtue of their grants, if their grants are maintained unimpaired, have the right to build these structures consistently with the Federal rule. They have just as much right, as against the State and the city, to build such structures upon their premises outshore of the bulkhead line as they had to fill in solidly inshore of the bulkhead line. They derived both rights from their grants. The only reason that one right is qualified is because of the Federal action,—not of any right of the State and city to impair the grants. The plaintiffs' property rights were not destroyed or affected by the Federal action so long as they are not exercised in conflict therewith.

But under the decision below, the State court has deprived the plaintiffs of all enjoyment of their premises outshore of the bulkhead line. They can have, the city maintains, no profitable use whatever of these premises. They cannot improve them in any way however consistent with Federal rules. They cannot obtain any wharfage or cranage or any advantages therefrom.

The action of the Federal Government in fixing bulkhead and pierhead lines did not afford any right to the city to say that the premises of the plaintiffs outshore the bulkhead line could not be covered with piers. The Federal Government did not establish a pier plan, but only a pierhead limit. Because the Secretary of War has laid down a line beyond which piers may not extend, the State says, through its legislation, that the plaintiffs shall have no piers at all.

If the State and the city wish to strip the plaintiffs' property of all its beneficial incidents outshore the bulkhead line, this may be done only upon the payment of just compensation. The reasoning of the courts below with respect to the plaintiffs' rights *inshore* of the bulkhead line is just as controlling with respect to the plaintiffs' rights *outshore* of the bulkhead line so long as these are exercised in due subordination to the Federal requirements.

We therefore insist that as the plaintiffs' premises lie far inside of the Secretary of War's pierhead line that the city, under the legislation of the State, has no right to occupy these premises for the purposes of its basins and slips and to act as proprietor by making the plaintiffs' premises tributary to the piers which, as proprietor, the city leases for the exclusive use of its lessees.

The city has not built the piers as continuations of the public streets or public piers as contemplated by the grants. The city has built piers, fenced them in, shedded them, and holds them with the assertion of exclusive proprietary rights, excluding all persons from their use and access thereto save its lessees and their patrons. Not content with this, the city, under the legislation of the State, precludes the plaintiffs from building any piers whatever over

their property between the streets and thus the city not only uses its own piers but compels the plaintiffs to submit to the use of their property for basins and slips for the city's piers. There is thus a complete appropriation by the city, which claims the right of appropriation under the State legislation of all the plaintiffs' premises outshore of the bulkhead line without compensation.

Our contention on the Federal question is that the legislation subsequent to the grants, to which this effect has been given, is invalid as an impairment of the obligation of contract and that the city should be restrained from appropriating the plaintiffs' premises in this manner unless and until compensation is made. The city should be enjoined from any interference with the plaintiffs' improvement of their premises for the purpose of building and maintaining wharfs and piers, and taking wharfage and cranage, and having access to the piers built within the lines of the streets, all being in accordance with their grants and not in conflict with the action of the Secretary of War in establishing the bulkhead and pierhead lines.

**No. 16—Appleby v. Delaney.**

*First. What was determined by the State Court?*

The application was for a *mandamus*. It was denied but “as a matter of right, and not in the exercise of discretion”, as the order explicitly states (*Record, No. 16, p. 4*).

The nature of the determination of the State Court in this proceeding is to be ascertained by an examination of the record. Again, we must call attention to the repeated statements of the Court of Appeals of New York, some of which we have quoted, that expressions in their opinions are not to be taken to countervail the record of the court’s determination.

In No. 16 the decision relates to the premises *inshore* of the bulkhead line as to which the plaintiffs’ title and right to fill in was sustained in No. 15. After the decision in No. 15 by the court of first instance, the plaintiffs applied to the appropriate authorities of the City of New York for a permit to fill in their premises out to the bulkhead line established by the Secretary of War. The municipal authorities refused the permit upon the ground that under the legislation of the State a bulkhead line had been fixed 100 feet farther inshore than the line of the Secretary of War. This was the only ground for the refusal. (See *Application for Permit, Record No. 16, Schedule A, pp. 24-34; Denial of Application, id., Schedule B, p. 35; Proceedings for New Bulkhead Line, id., Schedule I, pp. 59-62.*)

There is no controversy with respect to this. As the counsel for the City stated in his brief in No. 16 upon the former argument:

“After the decision in *Appleby v. The City of New York* by the court of first instance, the plaintiffs

applied to the commissioner of docks of the City of New York, who had jurisdiction over such matters, for a permit to fill in the areas between the present line of solid filling and the bulkhead line established by the Secretary of War in 1890 (R., pp. 24-34). The commissioner of docks refused the permit on the ground that a bulkhead line had been established by the State authorities 100 feet farther inshore than the line of the Secretary of War (R., pp. 64, 65) (see map, p. 58). It was his contention that no filling beyond the State's new bulkhead line could properly be made."

It was upon this refusal by the municipal authorities of the appropriate permit, that the plaintiffs asked for a *mandamus* in order that they might proceed with the improvement which they were entitled to make. Their petition not only set forth their property rights, but expressly invoked the contract and due process clauses of the Federal Constitution, thus raising the Federal question with respect to the authority of the City under the State legislation subsequent to the grant to establish a bulkhead line inshore the Federal line (*id.*, pp. 10-11).

The City answered opposing the application solely on the ground that the City had made its new plan establishing the new bulkhead line (*id.*, pp. 64, 65). This affidavit of the Commissioner of Docks in answer to the plaintiffs' petition is the only pleading in the proceeding.

The court of first instance denied the *mandamus* as a matter of right (*id.*, p. 4) and in its opinion (*id.*, p. 66). In its opinion, the court said that the permission of the City had not been granted, and that seemed to the court to be the end of it. In its very short opinion the position of the plaintiffs was seriously misconceived. Thus, the opinion



spoke of the inaction of the grantees. It wholly ignored the fact that almost immediately after the making of the grants the New York Legislature proceeded with new plans in 1857; that after the plaintiffs had started to improve their property, the Legislature passed the Act of 1871, which provided expressly for the condemnation of the water front rights which had previously been granted so that the new plans could be carried out; that the plaintiffs could not proceed to improve the premises in the face of this proposed condemnation; and that the City in 1894, actually instituted condemnation proceedings in which it was proposed to retake title to and pay for all the plaintiffs' premises and that these proceedings had dragged along until 1914, when the City discontinued them. The suit in No. 15 was then promptly brought to establish the plaintiffs' rights of property, and when the court of first instance had measurably sustained these rights, the *mandamus* proceeding in No. 16 was instituted. The plaintiffs have never been allowed to improve their property. Attributing delay to the plaintiffs in these circumstances is wholly unjustified.

On appeal to the Appellate Division, that court reasserted the plaintiffs' rights of property. The court said (*Record*, No. 16, pp. 73-74):

"We are deciding in the action that the rights of the appellant are not limited or restricted by this bulkhead line, but only by the bulkhead line which has been approved by the Secretary of War. They have, we think, an absolute right to fill in from the land granted by the same grants easterly of 12th Avenue, which has been filled in, to that bulkhead line, for it was fairly contemplated by the grants that they were to have free and unrestricted access to the bulk-

head or wharf from all of the lands granted which might lie easterly of the bulkhead line when lawfully established, in order that they might enjoy the wharfage and cramage rights granted to them in consideration of the money paid by them and obligations to build bulkheads and to make and continue in repair the streets and avenues within the exterior boundaries of the grants; and of such rights they can be deprived only by a voluntary relinquishment thereof, or by the exercise of the right of eminent domain, and making to them just compensation therefor (*Langdon v. Mayor*, 93 N. Y. 129; *Williams v. Mayor*, 105 N. Y. 419; *Matter of Commissioner of Public Works*, 135 App. Div. 561, aff'd 199 N. Y. 531)."

The Appellate Division did not take the view that the City was entitled to refuse permission to the plaintiffs to improve their property. The court *held* that the *mandamus* should issue, but that if the municipal authorities deemed it necessary that the bulkhead should be built on the new line sought to be established in 1916, the City should have an opportunity to acquire the property and property rights of the plaintiffs. The following was the statement of the conclusions reached (*id.*, p. 74):

"Since no objection was made by the Commissioner of Docks to the alternative plans for this improvement presented by the appellants, and there has been extensive litigation between the parties, which should be brought to an end, the order should be reversed and the motion for a peremptory writ of *mandamus*, requiring the respondent to issue a permit to the appellants based on one or the other of the proposed plans, as the same may be modified by him with a view to safeguarding the public in-

terests, should be granted; but if the Commissioner of Docks deems it necessary that the bulkhead and wharf should be built on the bulkhead line so established in 1916, the City should be afforded an opportunity to acquire the property and property rights of the plaintiffs essential to have the improvements conform to that bulkhead line.

“It follows that the order should be reversed without costs, and motion granted without costs; but it will be provided in the order that the writ shall not be issued for thirty days, and if within that time, an appropriate condemnation proceeding shall be instituted to acquire the property and property rights of the relators, then the issuance of the writ shall be suspended for a reasonable time to enable the City to acquire such property and property rights, but otherwise the writ will be issued at the expiration of 30 days.”

On appeal by the City to the Court of Appeals, the order of the Appellate Division was reversed and that of the Special Term affirmed (*id.*, pp. *a, b, c*).

This final decision of the State Court necessarily gave effect to the legislation of the State, and the action of the municipal authorities thereunder, establishing the new bulkhead line of 1916. The City had denied the plaintiffs' application upon the ground that their improvement conflicted with this new plan. The City opposed the petition for *mandamus* solely upon this ground and the Court as a matter of right denied the *mandamus*. Thus the City's plan and the legislation under which it was adopted is made completely effective overriding the plaintiffs' grants and property rights.

*Second. The Federal question.*

As against this determination the plaintiffs urged in their petition (pp. 10-11) and throughout the proceeding insisted upon their constitutional rights under the contract and due process clauses of the Federal constitution.

The fact that the Court of Appeals invoked the municipal ordinance of 1844 does not change the nature or effect of this determination. The contract clause of the Federal constitution would amount to nothing if a state court could construe for itself the grant which is alleged to be impaired by state legislation. Whether there is a contract, and whether it is impaired by the legislation, is necessarily a matter for the determination of this Court, if the contract clause is not to be a mere form of words.

The endeavor to qualify the plaintiffs' grants, by reference to the municipal ordinance, does not remove the case from the application of this rule. It makes no difference whether the ordinance is sought to be read into the grants or the grants are said to be construed in the light of the ordinance. It comes to the same thing,—that the grants are thus construed and limited. To determine whether they should thus be construed and limited is to determine what the plaintiffs' contracts are, their scope and effect. Suppose, for example, as is often the case, that the grant was found entirely in a municipal ordinance. It would none the less be for this Court to construe for itself the contract thus evidenced.

Thus in *Louisiana Railway and Navigation Co. v. Behrman*, 235 U. S. 164, the contract alleged to have been impaired was based upon a municipal ordinance. The State Court held that this ordinance, and hence the contract, was

“subject to a suspensive condition and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken” (235 U. S. pp. 169-170). When the case came before this Court, there was a motion to dismiss upon the ground that the State Court had given no effect to the subsequent enactment which was alleged to impair the contract, because of its construction of the ordinance and its conclusion as to the “suspensive condition.” It was urged that this was a non-Federal ground as the ordinance, on which the alleged contract rested, being subject to a condition, had not become effective.

This Court declined to give assent to this contention and held that it was its duty to construe the ordinance for itself. The Court recognized, of course, the established rule that where the State Court does not give effect to a subsequent enactment, the jurisdiction of this Court under the contract clause does not attach. But where the necessary consequence of the decision is to give effect to the subsequent enactment, the jurisdiction of this Court is not to be escaped because the decision of the State Court is placed upon the ground that the contract was not made or has become inoperative through failure to perform an alleged condition or otherwise.

In *Detroit United Ry. v. Michigan*, 242 U. S. 238, 247, 248, 249, the Court said:

“But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this

irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation. *McCullough v. Virginia*, 172 U. S. 102, 116, 117; *Houston & Texas Central R. R. Co. v. Texas*, 177 U. S. 66, 77; *Terre Haute &c. R. R. Co. v. Indiana*, 194 U. S. 579, 589; *Hubert v. New Orleans*, 215 U. S. 170, 175; *Fisher v. New Orleans*, 218 U. S. 438, 440; *Carondelet Canal Co. v. Louisiana*, 233 U. S. 362, 376; *Louisiana Ry. & Nav. Co. v. New Orleans*, 235 U. S. 164, 170. The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error. Whether the agreement thus invoked, when properly construed, has the effect attributed to it, is a question that touches upon the merits, and not upon the jurisdiction of this court."

\* \* \* "But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation? *Houston & Texas Central R. R. Co. v. Texas*, 177 U. S. 66, 77; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 147; *Terre Haute &c. R. R. v. Indiana*, 194 U. S. 579, 589."

See also

*Columbia Railway v. South Carolina*, 261 U. S. 236, 245.

This Court has held that it will not limit itself, in determining whether effect has been given to the later statute, to the mere construction of the language of the opinion of the State Court.

*McCullough v. Virginia*, 172 U. S., 102, 117.

*Houston & Texas Central R. R. Co. v. Texas*,  
177 U. S., 66, 76, 77.

*Hubert v. New Orleans*, 215 U. S., 170, 175.

*Carondelet Canal Co. v. Louisiana*, 233 U. S.,  
362, 376.

*Long Sault Development Co. v. Call*, 242 U. S.  
272, 277.

Under the decision of the State Court, the City is permitted to go ahead with its bulkhead plan of 1916, which was the sole ground for the denial of the City's permit, and is allowed to ignore any contention of the plaintiffs that they have rights in opposition to that plan. The question is whether the plaintiffs' grants, construed in the light of the ordinance invoked, admit of such a construction as to give the municipal authorities the arbitrary and absolute power to prevent the plaintiffs from making any improvements on their premises, although consistent with Federal action and however well designed. If this is not the true construction of the grants, they are manifestly impaired by the legislation subsequent to the grants under which the City has made its new plan.

*Third. The true construction of the plaintiffs' grants in the light of the ordinance invoked by the City.*

It is most extraordinary, when one considers the development of the water front in New York City, that this

is the first time, we believe, that this ordinance has been successfully invoked to qualify and limit beneficial grants of the character under consideration. The ordinance was passed in 1844. It is said by counsel for the City that it was made irrevocable by the Laws of New York of 1845, Chapter 225, Section 5, which is quoted on page 6 of the brief of counsel for the City in No. 16 upon the former argument. We do not see that the Act of 1845 in any way changes the question or supports the contention of the City as to the construction of the plaintiffs' grants, but it will be observed that the intent of Section 5 of Chapter 225 of the Laws of 1845 was simply to make the ordinance of 1844, and other ordinances mentioned in that Act, unamendable only in so far as they related to the sinking fund. It was the integrity of the *sinking fund* for the redemption of the City debt, and not the permission to make improvements under the City's grants, that the Act of 1845 sought to protect.

The provision of the ordinance of 1844 which is here invoked is as follows:

"No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

It will be noted that the ordinance provides that the prescribed "permission" is to be "had and obtained from the *Common Council*." It was, therefore, entirely appropriate in any view for the Common Council to give this permission. But the plaintiffs' grants were made directly *by* the Common Council. The grant of 1853 was made by "The Mayor, Aldermen and Commonalty of the City of



New York." It was signed by "*Jacob A. Westervelt, By The Common Council, D. T. Valentine, Clk., C. C.*" (that is, Clerk of the Common Council). It was acknowledged by D. T. Valentine as Clerk of the Common Council, who in his affidavit says that the seal affixed to the grant was affixed by the authority of the Common Council. (*Record*, No. 15, Ex. 4, pp. 376-377). The grant of 1852 was made by the Common Council in like manner (*id.*, Ex. 5, p. 387; *Record*, No. 16, p. 55).

The Common Council in these grants expressly provided as to what permission for improvements should be required, and it has been held explicitly by the State Court that the permission referred to in the grants only related to that portion of the premises lying within the streets and avenues, which was excepted from the grants and which the plaintiffs had covenanted to build upon request.

We have this extraordinary situation: In No. 15 the plaintiffs distinctly presented in their complaint the question of their right to fill in the granted premises without obtaining permission from the city. The complaint alleged as follows (*Record*, No. 15, Amended Complaint, par. XVII, p. 16):

"XVII. That the plaintiffs and their testator and predecessor in title had a right under said grant and under the Laws of the State of New York to fill in all of said land under water between Thirty-ninth and Fortieth Streets, Twelfth and Thirteenth Avenues, shown on the map in Schedule "A" herein, and to reclaim it from the river and make it dry land, *without having first to obtain permission so to do from the City of New York or its predecessor, the Mayor, Aldermen and Commonalty of the City of New York*" (italics ours).

This allegation was denied by the City's answer (*id.*, p. 64, Amended Answer, par. 17, p. 64). It was upon this issue that the Appellate Division passed in its conclusion No. 28 with respect to the premises *inshore* of the bulkhead line fixed by the Secretary of War (*id.*, p. 550) as follows:

"28. The plaintiffs have the right to fill in and make dry land at their pleasure, and without the consent of the City of New York of so much of their said premises as lie between the westerly side of 12th Avenue and the bulkhead line established by the Secretary of War in 1890."

And, as we have seen, this conclusion was not disturbed by the affirming judgment of the Court of Appeals in No. 15 which said distinctly that the title to this portion of the premises could not be retaken by the city by the exercise of police power, without making compensation (*id.*, pp. 568, 569).

Moreover, the decision of the court of first instance in No. 15 passed upon the effect of the covenants in the grants relating to the permission required for making lands as follows (*id.*, *Decision*, pars. (14), (15), pp. 197-198):

"(14) VII. The covenant by the grantee, that he, his heirs and assigns

'will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors,'

relates only to the lands in the streets and avenues and not to the intervening spaces between the streets and avenues.

“(15) VIII. The covenant by the grantee, that he, his heirs and assigns

‘will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose,’

refers only to the lands under water in front of the plaintiffs’ premises and there is no such covenant as to the granted premises between the streets and avenues.”

These conclusions were not disturbed by the Appellate Division or by the Court of Appeals in its decision in No. 15 (*id.*, p. 551).

So that, in support of our contention as to the true construction of the grants, we have not only the argument that we advance but the actual determination of the State Court in No. 15, which sustained this construction with respect to the premises *inshore* of the Federal bulkhead line, and with respect to the meaning of the covenants in the grants requiring permission of the City authorities for improvements within that line. We have in No. 15 the issue presented, as a part of the issue relating to the plaintiffs’ title and the extent of their property rights, whether they were entitled to improve their premises inshore of the Federal bulkhead line without the consent of the City and an adjudication explicitly to the effect that they did have this right. And, it is only with respect to this portion of the premises that the application in No. 16 had reference.

This determination in No. 15 is consistent with the prior rulings of the Court of Appeals of New York in relation to the true construction of this class of grants.

These conveyances, for beneficial purposes, extending the *ripa* by granting the fee simple under the legislative authority given for that purpose, was construed in *Duryea v. Mayor*, 62 N. Y. 592 (the first *Duryea* case), and that construction had never been disturbed prior to the opinion of the Court of Appeals in No. 16. In the first *Duryea* case the Court said (pp. 596-597):

“There is certainly no express prohibition or covenant against filling in the intermediate spaces between the shore line and the line of the streets, avenues, wharves, etc. The deed conveys nine several pieces of land under water by metes and bounds, adjoining certain contemplated streets running to the East river. The spaces to be occupied by streets are not conveyed. It contains covenants that the grantee shall, within three months after being required, make and construct the streets and wharves and bulk-heads referred to, ‘and will also fill in the same with good and sufficient earth, and regulate and pave the same and lay the sidewalks thereof.’ It also contains a covenant that the grantee will not build the streets, wharves, etc., ‘or make the lands in conformity with the covenants hereinafter’ mentioned, until permission shall be obtained from the city. The only covenant in the deed for *making* lands applies exclusively to the building of streets, wharves, etc., and there is not a word pertaining to the intermediate spaces. It is claimed that there is an implied prohibition against it because it is impracticable to fill in the intermediate spaces without the streets and wharves for support. There is no evidence to this effect, nor can we take judicial notice of the fact.” \* \* \* “*The estate granted is a fee simple, and the deed confers upon the grantee and its assigns all the rights and privileges of an ab-*

*solute owner except as restricted by the covenants and reservations contained in it. The beneficial enjoyment of property belongs to the ownership and the construction contended for would deprive the plaintiff or any such enjoyment, until the city ordered the streets and other structures to be made. It is a general rule that exceptions and restrictions are to be construed strictly against the grantor and are not to be extended beyond the fair import of the language expressed except by necessary implication. No such implication arises in this case. While the city properly retained the control and direction of the time and manner of making streets, etc., it is not apparent how that control is inconsistent with the beneficial enjoyment of the intermediate spaces. It certainly does not appear in the case as now presented. It is unnecessary to consider other questions'' (italics ours).*

Upon this construction of grants of this class, that the grantees have a fee simple with the privileges of an absolute owner except as restricted by the covenants and reservations contained in the grants, the water front of the City of New York has been improved and millions of dollars have been expended. Numbers of grantees under such grants have enjoyed these rights of property of which under the ruling in No. 16 it is now proposed by the City that the plaintiffs shall be deprived.

It is said that in the first *Duryea* case the ordinance of 1844 was not brought to the attention of the Court. The significance of this fact seems to us to be quite different from what the City contends it to be. For the first *Duryea* case reached the Court of Appeals in 1884, forty years after the ordinance in question. The City was a defendant in the suit. The question of title under a grant was involved, the

grant having been made in 1848, four years after the ordinance in question. Is it not extraordinary, indeed inconceivable, that, if during these forty years there had been any such construction of the grant as that for which the City now contends, or such an effect had been given to the ordinance in limiting the grant, this ordinance would not have been brought to the attention of the Court? The manifest inference is, as we believe the fact to be, that the City had never used this ordinance for the purpose for which it is now invoked in attempting to override these grants. The question before the Court of Appeals in the first *Duryea* case involved directly the construction of grants of the class here involved, that is, the title conveyed and the property rights acquired, and there was no suggestion that the ordinance limited the grants or that the permission of the City was required by the ordinance.

Reference is made by the Court of Appeals in its opinion in No. 16 (p. 78) to the second *Duryea* case (*Duryea v. Mayor*, 96 N. Y. 477). The Court of Appeals says that in that case the ordinance was called to the Court's attention and it was held that the Common Council had given its consent (*id.*). But we submit that this statement is not adequate. For what did the Court of Appeals say in the second *Duryea* case with respect to the ordinance then brought to its attention? In the first place, the Court set forth in explicit terms what it had decided upon the former appeal, in the first *Duryea* case:

*"Upon a former appeal in this case to this court, reported in 62 N. Y. 592, it was held that the grantee in this deed took an estate in fee-simple and became thereby invested with all of the rights and privileges of an absolute owner, except as restricted by the*

*covenants and reservations contained in it. It was further held that the true construction of the covenants contained therein did not require the previous consent of the common council to authorize the grantees to make and fill up the intermediate spaces between the several streets and avenues therein described, but that such covenant was necessary only to authorize the construction of the streets, wharves and avenues therein provided to be made by the grantee*" (96 N. Y., p. 488, italics ours).

Then in discussing the ordinance, the Court said (*id.*, pp. 494-496):

"It may very well be doubted whether the construction formerly given by this court to the covenants contained in the deed should not also be deemed applicable to the provision of the sinking fund ordinance.

"The object of this provision was not to cause any interest in the land conveyed to be retained by the grantor, or to postpone the period of enjoyment of its owners, or increase the security of the public creditors, but was obviously designed to enable the grantor to shield itself from the burden of caring for and maintaining the piers, wharves and streets until such time as it should deem the assumption thereof profitable and expedient, and to fix the time and manner of erecting those structures with reference to the introduction therein of water, gas, sewer pipes and other necessary conveniences which naturally fell under the supervision and control of the city authorities. The accomplishment of this object would in no way be materially interfered with by allowing the grantees to proceed with their contemplated work of redeeming their lands from the water and realizing the benefits, which were the sole inducement to them, for its purchase.

"The conduct of the defendant through all of its departments, for a period of upwards of twenty years, has affixed this interpretation upon the clause of the ordinance and deed in question, and it would seem to accord with the true meaning and intent of those instruments. It was a provision originally voluntarily adopted by the city authorities, and was intended for the sole benefit of the municipality. It was not imposed as a limitation upon their authority to convey, but was adopted simply for the purpose of restraining the power of the grantee to throw an untimely burden upon the corporation. When the deed was given, strictly in accordance with the power conferred by the ordinance, a good title was conveyed to the grantees, its object was satisfied, and all subsequent power to enforce the performance of the contract was vested solely in the city. It could release the grantee from his covenants, accept satisfaction, or waive conditions, as could any other party to a contract containing provisions intended solely for his benefit.

"The rule by which this ordinance is to be construed is such as applies to the interpretation of the acts or other legislative bodies, and is that which shall be effectuate the intent of its authors. The reason and object of an act are to be regarded to arrive at its meaning, and while it is not competent to interpret that which has no need of interpretation, or to deny to clear and precise terms the sense which they naturally present, yet when such terms lead to manifest injustice and involve an absurdity, law and equity both require us to give such an effect to the language used as will accomplish the obvious intent of the legislature. (*Waterliet Turnpike Co. v. McKeon*, 6 Hill 616; *People v. Utica Ins. Co.*, 15 Johns. 358; *Holmes v. Casey*, 31 N. Y. 289; *People v. Draper*, 15 *id.* 532.)



“The only lands expressly provided to be made by the ordinance are those constituting the piers, wharves, streets and avenues, and since it is unnecessary in order to give the clause in question an office to perform, to extend it to lands outside of such streets, and to create a right unconnected with those clearly intended to be granted, it is in accordance with settled rules of interpretation to limit the effect of general language to the accomplishment of the object undoubtedly intended (*Donaldson v. Wood*, 22 Wend. 395). If it be held that the words ‘make lands in conformity thereto,’ as used in the ordinance, apply only to lands necessary to form the piers, bulkheads and streets, the defendant will not only be protected in all of the rights intended to be secured to it, but the grantee will receive the benefits of his purchase and the deed will be free from objection on account of the apparent repugnancy existing between the interests actually conveyed and those apparently reserved.”

In short, the Court of Appeals, in the second *Duryea* case, in construing the ordinance and the grant in relation to the ordinance, clearly indicated its opinion *that the ordinance should be construed in its reference to the permission of the City in the same way that the covenants in the grant should be construed in relation to that permission.* With respect to the City’s permission the Court had held in the first *Duryea* case that the covenants did not relate to the intermediate spaces, that is, to the intermediate spaces between the several streets and avenues (which were granted) and in the second case the Court showed that its opinion was that this construction should also be given to the ordinance. The Court pertinently said that the construction should be to carry out the intent and to avoid

“manifest injustice and involve an absurdity.” Plainly, the Court felt that the construction for which the City contended did “lead to manifest injustice and involve an absurdity.” The Court thought that it was absurd to conclude that the grant, in the light of the ordinance, conveyed the premises only to place all opportunity for their improvement within the arbitrary control of the grantor. This was to destroy the grant, not to carry out its intention. The Court summed up its views on the point by the statement that it was “quite inconceivable” that the parties should purchase land burdened with such a condition. The Court said (96 N. Y., p. 496):

“It is quite inconceivable that parties should purchase land burdened with the condition that it should be enjoyed only by the permission of the grantor, and a construction having that effect, should only be adopted when no other is possible, or sustainable.”

And after saying this, the Court did proceed to say that the City had in fact consented. A stronger declaration of its opinion as to the construction of the grant could hardly have been made.

These expressions of the Court of Appeals in the second *Duryea* case gain in importance when it is remembered that vast amounts had been expended in improving the water front under such grants without any permission by the City, that is, without performance of the condition which was there sought to be read into the grants by reference to the ordinance of 1844. The briefs in the Court of Appeals in the second *Duryea* case stress this point.

In *Williams v. Mayor*, 105 N. Y. 419, the City's grants were made in 1858 and 1859, after the act of 1857 which fixed a bulkhead line or line of solid filling. After referring to that act, the Court said (p. 433):

“We are able now to see what the rights of the city were when it conveyed to Williams & Towle. The city owned the upland. In front of it the harbor commissioners' line had been established. The erection of a new wharf on that line was desired. Its construction would shut in and destroy the old wharf on the old west line of Thirteenth avenue, and require a solid filling which the city had a right to make, and having made, would own and possess. It had a further right as against the State; an easement for the approach of vessels over the lands of the State under water, in front of the harbor commissioner's line, whenever a new wharf should be built upon that line. All these rights it conveyed to Williams & Towle and vested every one of them in them. It had the power to convey them (*Langdon v. Mayor, etc., supra*). It did convey them. Its deeds cover the open space between the avenue bulkhead and the harbor commissioner's line, and make that the west or outer line of the grant. They were made and accepted upon an understanding of the city's rights precisely as we have held them to exist. One of them described the property thus: ‘All that certain water-lot or vacant ground and soil under water, *to be made land* and gained out of the Hudson, or North river, or Harbor of New York, and so much thereof as has already been made and gained,’ etc. The municipal authorities either at that date understood their rights as we do, or else perpetrated a deliberate fraud upon an unsuspecting purchaser.”

In *Mayor v. Law*, 125 N. Y. 380, the rule of the *Duryea* cases was reaffirmed. The Court said (p. 391):

“The grantee became the absolute owner of the land between the streets—the land granted, and that he could fill up whenever he chose, suiting his own pleasure as to the time and manner of doing it, but there was nothing in the grant binding him to fill it up (*Duryea v. Mayor, supra*).”

There is no qualification in this statement, made seven years after the second *Duryea* case, with respect to the ordinance of 1844. There has been nothing inconsistent with this plain ruling, until the opinion of the Court of Appeals in No. 16. We think, therefore, that despite the language of the opinion in the case under review that the repeated rulings of the State Court themselves may be invoked as to the true construction of these grants, and that is, that there was no reservation of an arbitrary power in the City to withhold permission to make solid filling in the premises conveyed, but that the grantees had the right to proceed with this improvement without the consent of the City and by virtue of their title as owners in fee. In addition, we have the actual construction of the grants to this precise effect in the decision of the State Court in No. 15.

But, apart from this construction, it is submitted that this Court which will construe the grant for itself and that the invocation of the ordinance is in derogation of the grant. A construction involving such a condition repugnant to the grant is not favored in the law. On the one hand the City conveys title in fee, purports to grant all the title it has and all the State had (Laws of New York, 1837, Chap. 182), demands covenants from the grantees, de-

mands the payment of taxes, and on the other hand insists that it has an absolute reserved right to prevent any beneficial use of the property conveyed. It strips the fee of all its beneficial incidents, and then says sardonically that the grantees only took a "naked fee". The condition alleged makes the grants worthless, so completely worthless that as the Court of Appeals said in the second *Duryea* case, it is "quite inconceivable" that any purchaser would knowingly take title with such a condition. The construction limiting the grant by reference to the ordinance so as to require the City's permission as a condition for any improvement of the premises granted and paid is wholly untenable.

The ordinance itself, however, as has been pointed out, only requires permission of the Common Council. The plaintiffs' grants made by the Common Council must be deemed to contain that permission as they contain explicit covenants as to what building or making of land, that is within the excepted streets, shall require any further permission. These covenants, as uniformly held by the State Court, only apply to the excepted streets. After the grants, subsequent to the ordinance, were made by the Common Council itself, defining their terms and the scope of such permission as should be required, the ordinance of 1844 had no remaining vitality or effect with respect to the grants. It was superseded by the terms of the grants themselves.

If, however, it can be said that any permission on the part of the City is required in relation to these improvements, that permission could go only to that sort of police supervision on the part of the City which is appropriate in all building operations, excavations or improvements within the City limits so as to safeguard life and property from unnecessary injury.

The purpose of the petition in the instant case was to secure this police permit without which nothing can be done within the borders of the City no matter how complete the ownership of property. This permit was denied and in order to deny it a condition was read into the grants repugnant to the grants, and, as it seems to us, wholly indefensible.

*Fourth: The effect given by the State Court to the legislation impairing plaintiffs' grants.*

It is not disputed that if there is no legislative action subsequent to the grants to which effect is given by the determination of the State Court the decision is not reviewable here under the contract clause. But it is equally clear under the authorities above cited that if the consequence of the decision of the State Court is to give effect to a subsequent enactment impairing the obligations of the grants, the decision is none the less reviewable because the State Court attempted to support it by holding that there was no contract to be impaired, or that a condition of the contract had not been performed, or that the contract had become inoperative. If this Court finds that there is a contract; that the condition sought to be read into it by the State Court should not be read into it; that the contract is operative; then the remaining question is simply whether the determination of the State Court does give effect to subsequent legislation causing impairment of the contract.

In this case that effect is clear. The City has established a new water front plan in 1916, pulling the bulkhead line inshore 100 feet from the Federal bulkhead line. The only reason for refusing the permit for which the plaintiffs ask in order that they might proceed with their improve-

ments was that the City's new plan stood in the way. The determination of the State Court upholds the City in its refusal. It makes the new plan secure. It gives the City complete opportunity to go forward with it and establish the new bulkhead line. The establishment of that line impairs the plaintiffs' grants. The determination is just as effective for this purpose as any action could possibly be. That new plan of the City is legislative in character. The City under State authority lays down the line beyond which there shall be no solid filling. That is a legislative rule. It is elementary that it makes no difference by what sort of legislation the contract may be impaired; whether it is a statute of the state legislature or an ordinance or action by the City under the authority granted by the State.

*Williams v. Bruffy*, 96 U. S. 176, 183.

*New Orleans Water Works Co. v. Louisiana Sugar Co.*, 125 U. S. 18.

The Greater New York Charter is legislation subsequent to the grants. In making its new plan, the City acted under the provisions of the Charter and laid down a legislative rule covering its permits. That is legislative action subsequent to the grants. To this action effect is given and it impairs the obligations of the plaintiffs' contract and deprives them of their property without due process of law.

The Appellate Division, we submit, decided the case correctly and in accordance with the plaintiffs' constitutional rights in holding that the *mandamus* for the permit should issue, and allowing time to the City to condemn the property if it saw fit to do so in order to carry out its plan.

The judgment in No. 15 and the final order in No. 16 should be reversed and the cases remanded for proceedings not inconsistent with the opinion of this Court which it is submitted should sustain the plaintiffs' property rights under their deeds and deny the authority of the City to interfere therewith unless and until just compensation is made.

Respectfully submitted,

CHARLES E. HUGHES

BANTON MOORE,

Of Counsel for Plaintiffs-in-Error.



FILED

FEB 15 1926

WM. R. STANSBURY  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
individually and as executors, etc.,  
*Plaintiffs-in-Error,*  
*against*

THE CITY OF NEW YORK, *et al.*,  
*Defendants-in-Error.*

No. 16.

EDGAR S. APPLEBY and JOHN S. APPLEBY,  
*Plaintiffs-in-Error,*  
*against*

JOHN H. DELANEY, as Commissioner of Decks of  
The City of New York,  
*Defendants-in-Error.*

*In Error to the Supreme Court of the State of New York.*

**REPLY BRIEF FOR PLAINTIFFS-IN-ERROR ON  
REARGUMENT.**

18-13  
CHARLES E. HUGHES,  
BANTON MOORE,  
*Of Counsel for Plaintiffs-in-Error.*



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No. 16.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
NEW YORK.

**REPLY BRIEF FOR PLAINTIFFS-IN-ERROR  
ON REARGUMENT.**

We desire to present the following reply to some of the  
statements and arguments advanced for the defendants-in-  
error on this reargument.

**No. 15, Appleby v. City of New York.**

The "real consideration" (*Brief for Defendants-in-Error on Reargument, No. 15, p. 6*) for the plaintiffs' grants was not simply the filling in between the streets, which they were free to do at their pleasure (See *Mayor v. Law*, 125 N. Y. 380, 391), or the covenants to make and maintain, on the City's request, the streets and avenues and the bulkheads within the streets, and pay taxes, but also a substantial—indeed for the time—a large cash consideration paid to the City (*Record No. 15, pp. 367, 368*). The plaintiffs would have filled in and made the land and bulkheads on their premises between the streets if the City had not prevented this, asserting its intention to take the premises by condemnation. The first intimation of a refusal to recognize the plaintiffs' title was the discontinuance of the condemnation proceedings and thereupon this suit was brought.

The waters over the plaintiffs' premises beyond the bulkhead line are not "part of the navigable waters of the river" (*Brief for Defendants-in-Error on Reargument, p. 9*) in the sense that they are free from the obligation of the plaintiffs' grants, or in the sense that they are made such by any action of the Federal Government. So far as Federal action is concerned, the premises in question may be covered by piers, as indeed the City has covered the adjoining property, within the lines of the streets, by piers. The City, in trying to give these premises the status of being a "part of the navigable waters of the river" is simply endeavoring to repudiate its own grants by which the *ripa* was extended to Thirteenth Avenue, an extension which, in the absence of resumption of title upon just compensa-

tion, was final with respect to the City, and with which so far as the building of piers is concerned the Federal Government has not interfered. It will be noted that the City admits (*id.*, p. 9) that it "prohibits the building of any structures on the plaintiffs' property beyond the bulkhead line".

**First:** The City contends, in its first point (*id.*, p. 9), that "the acts of the State do not amount either to a taking of property or the impairment of the obligation of a contract".

What the City has actually done admits of no question. The City, acting under the State legislation subsequent to the grants, has prohibited the plaintiffs from filling in, and from building any structures upon their premises between the streets. Is this not an impairment of plaintiffs' rights under their grants? The City has built piers within the lines of the streets, shedded them and leased these piers with exclusive rights. These piers are continuations of the streets and the plaintiffs under their deeds are entitled to access to them as public streets (*Record*, No. 15, Plaintiffs' Ex. 4, fol. 1114; Ex. 5, fol. 1147). The plaintiffs are also entitled to "all manner of wharfage, cranage, advantages or emoluments" accruing in front of the premises conveyed to them between the streets (*id.*, fols. 1121, 1122, 1154). These rights have been overridden by the City acting under State legislation subsequent to the grants. The plaintiffs being prevented from building any structures whatever, the premises belonging to the plaintiffs are used as basins or slips for the exclusive advantage of the City and its lessees. The City prohibits the plaintiffs from using their premises in any manner so that this exclusive advantage of

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the City and its lessees can be maintained. The City dredges out the spaces between its piers, actually removing the land under water which belongs to the plaintiffs, in order to facilitate the use of the granted premises by the City and its lessees. The City, in its former argument, denied that the plaintiffs could make any "profitable use" of their property. The plaintiffs thus are allowed to enjoy nothing and are compelled to pay taxes. Is not this an impairment of the obligations of the grants?

The brief for the City (*id.*, p. 9) says that the courts of New York have held that the title of the City and its grantees "to the land under the waters of the Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the waterfront."

Such a statement, as applied to grants of the sort here involved made by the City along the shore and within the defined *ripa* under the Laws of New York of 1837, Chapter 182, (*Brief for Plaintiffs-in-Error on former argument*, pp. 13-15) is without foundation.

The decision of the Court of Appeals in the case at bar is itself an answer to such a contention, so far as the plaintiffs' premises inshore of the Federal bulkhead line is concerned. If the State and the City under its authority had this broad power of regulation, why could they not establish the bulkhead line further inshore? But the Court of Appeals held in No. 15 that the plaintiffs' grants could not be overridden in this way. Instead of holding that the title to land under water on the shore of the Hudson River, no matter how granted, was "subject to such regulations as the public authorities may impose" the Court of Appeals has held in this case that inshore of the bulkhead line, which

was also land under water, the State and the City could *not* "convey lands under water to private owners and retake the same by the exercise of the police power without making compensation therefor." The Court of Appeals said that the grant to the plaintiffs was "a property right which can be resumed by the City only on payment of compensation" (*Record*, No. 15, pp. 568, 569).

In this statement of the law, the Court of Appeals followed a line of decisions, cited in our principal brief, holding that grants of the sort here involved convey the fee simple absolute subject only to the exercise of Federal power. And, we believe it to be clear, that so far as the State and City are concerned there is no difference between the plaintiffs' title to the premises inshore of the Federal bulkhead line and that to their premises outshore of that line and lying within their boundry, being the Thirteenth Avenue as defined. The difference is not in the grants, or in the title conveyed, but is ascribed by the State court, erroneously as we insist, to the Federal action. The State court attributed to the Federal action an effect as to the use of the plaintiffs' property which cannot be justified, for that action still permitted the building of piers, wharves and other structures, without solid filling, and all such improvements the State and City seek to prevent.

It is one thing to contend that the action of the Federal Government in fixing a bulkhead line and a pierhead line has in some way endowed the State with power to repudiate and impair its grants, although the improvements sought to be made by the grantees are consistent with the Federal action, and it is quite another thing to contend that independent of the Federal action the plaintiffs' rights, whether inshore or outshore of the bulkhead line, were subject to

State regulation despite the grants. Apparently conscious of the weakness of the first contention, the City advances the second which rests, we submit, on a misapplication of the State decision.

The application sought to be made by the City (*Brief for Defendants-in-Error on Reargument*, pp. 9-16) of general expressions in opinions of the State court is shown to be unwarranted by the decisions from which these expressions are taken. Not only do these decisions fail to justify any right of regulation to impair grants such as those here involved, but they show that the City cannot interfere even with *pier* rights, granted within the limits of streets, without making compensation. *Knickerbocker Ice Co. v. 42nd St. R. R. Co.*, 176 N. Y. 408 and *American Ice Co. v. City of New York*, 217 N. Y. 402. In these cases the question related to a pier at the foot of Forty-third Street and the Hudson River. The pier was within the lines of the street. It is quite clear that the right in this pier pertained principally, if not entirely, to what not only lay outshore of the bulkhead line, but also outshore of the proposed Thirteenth Avenue (the boundary of the grants to the plaintiffs in this case). It is manifest from what is stated in the *American Ice Company* case (217 N. Y. at p. 420), where in quoting from an earlier case involving the same property (193 N. Y. 519) the court said that the pier owners had no right to compensation for damages to the *old structure* which might at any time have been rendered worthless "by the filling in of the land as far westerly as Thirteenth Avenue". But the Court pointed out (217 N. Y., p. 420) that the City was proposing to build a new pier extending 700 feet westerly into the Hudson River on a line 20 feet *south* of the southerly line of Forty-third Street. This, it was said, would

destroy the right of the Ice Company to build and maintain a pier at the foot of Forty-third Street. The Court held that conceding that the Ice Company had at the time no pier at the foot of Forty-third Street it "*still retains the right to maintain a pier at that point and that right cannot be destroyed without compensation*". That right existed under a grant by the City in 1852 of a right to maintain a pier. While it was held that the grant of this right to maintain a pier at the foot of the street was not a grant of the fee but of an incorporeal hereditament attached to the fee, still the plaintiff had the right to follow the "*lawful extension of Forty-third Street for the purpose of maintaining a pier*". This was the original decision in the *Knickerbocker Ice Company* case (176 N. Y., p. 419) and this construction of the grant of 1852 the Court said was consistent with its decision in *Langdon v. Mayor*, 93 N. Y. 129, to the effect that "a grant of the right of wharfage is property, the possession of which can only be resumed by the State or municipality, by due process of law and upon proper compensation".

The case of *Matter of Mayor*, 193 N. Y. 503, was a condemnation proceeding brought by the City to acquire title to waterfront property on the Hudson River between Forty-second and Forty-third Streets, and the question considered was as to the right of the American Ice Company, as the successor of the Knickerbocker Ice Company, to compensation for its pier right at the foot of Forty-third Street. The court held that the company was clearly entitled to compensation for its *pier* right, but that the condemnation proceeding then at bar related only to the land under water between Forty-third and Forty-second Streets and that none of the rights of the Ice Company were

appurtenant to the premises sought to be condemned. That it had no legal right of access over the premises between the streets (*id.*, p. 519). Upon the next trial it was stipulated that compensation might be awarded for the plaintiffs' rights in that action, and thereupon the right to that compensation was sustained. (*American Ice Co. v. City*, 217 N. Y. 420, 421.)

An examination of these decisions shows that there is nothing therein inconsistent with the line of decisions upholding the rights of grantees under grants such as those in the instant case, which are held to be grants in fee simple and the enjoyment of the rights under which cannot be destroyed without compensation by the exercise of the regulating power of the State. (*Duryea v. Mayor*, 62 N. Y. 592, 596, 597; *Langdon v. Mayor*, 93 N. Y. 129, 145, 161; *Duryea v. Mayor*, 96 N. Y. 477, 488; *Williams v. Mayor*, 105 N. Y. 419, 433; *Mayor v. Law*, 125 N. Y. 380, 391.)

The case of *People v. New York and Staten Island Ferry Co.*, 68 N. Y. 71, related to a grant under the Act of 1813 and presented a different question. As we have pointed out in our principal brief, it is not inconsistent with the *Duryea* case (62 N. Y. 592) decided but a short time before by the same judges.

Until its argument was overridden by the Court of Appeals in the case at bar, the City attempted to apply it as well to the portion of the premises of the plaintiffs inshore of the bulkhead line as to that portion outshore of that line. And, of course, that would be necessary to be consistent. But the City's counsel now speaks of the plaintiffs' title as complete within the bulkhead line (*Brief for Defendants-in-Error on Reargument*, p. 16) and that concession destroys the basis of his argument. The State

defined the *ripa* and authorized the City to make proprietary grants. The City under this authority granted all the title that it had. The State established the *ripa* at Thirteenth Avenue and if it wishes to change that and thus override its grants, it can do so only on payment of just compensation. Whether or not a subsequent bulkhead line is run across the property in no way affects the plaintiffs' title and rights under their deeds as against the State and the City so long as nothing is done to conflict with Federal rules.

We are amazed at the following statement of the City's counsel on page 20 of its brief on reargument: "Outshore of the bulkhead line, however, we are in navigable waters. Here, every private right is subordinate to the right of the public. All ownership is subject to public regulation".

Is it counsel's contention that the State and the City can grant pier rights and then destroy them by regulation? The City's position is opposed to numerous decisions and constant practice. As we have just seen, in the *Ice Company* cases, a pier right was sustained and compensation awarded. It is settled law that the City under the authority conferred by the State may make reasonable grants along the water front, and extending outshore of the bulkhead line, for beneficial enjoyment and that such grants having been made for a valuable consideration, and being consistent with the Federal rules, there is no authority in the State and the City to override the private right and to make the ownership subject to public regulation which destroys the benefit of the grant. The premises involved in the *Ice Company* cases between Forty-second and Forty-third Streets are shown in defendant's Exhibit D (*Record No. 15*, p. 531). The possibilities of a pier at the foot of

Forty-third Street can readily be seen and the nature of the pier right for which compensation was awarded cannot fail to be appreciated.

In *Matter of Old Pier No. 49*, 227 N. Y. 119, there was an award under a condemnation proceeding to the private owners of a pier which ran outshore of the bulkhead line. The question there turned on whether the right to *shed* the pier had been obtained under a revocable or an irrevocable license, and the evidence showed different values according as the pier was regarded as a shedded or an unshedded pier. The court held it should be valued as a pier which was shedded under a revocable license, but there was no question as to the right to be compensated for the *pier* as an unshedded one. The right to maintain the pier was not overridden because it ran outshore of the bulkhead line; it was not subject to a public regulation which could destroy it. It was not a private right which was subordinate to the rights of the public. It was a private right which had been created under a competent grant and paid for and which could not be resumed without compensation. Hence, the condemnation proceeding. In the *Ice Company* case (193 N. Y. 519) it was conceded for the purpose of the discussion that the Ice Company had no pier at the time at the foot of Forty-third Street, but was entitled to maintain one. Whether it is a right to have a pier or a right to maintain a pier, the result is the same. The fact that the pier runs outshore of the bulkhead line, but within the pierhead line, does not permit it to be destroyed, as it is a property right under a valid grant.

In *Matter of Mayor*, 135 N. Y. 253, the question related to condemnation proceedings instituted by the City to acquire title to lands between Thirty-fourth and Thirty-fifth Streets, Thirty-fifth and Thirty-sixth Streets and Forty-



first and Forty-second Streets on the Hudson River. It was contended that the water front properties held by the New York Central & Hudson River Railroad and the Consolidated Gas Company were already devoted to a public use and hence not subject to condemnation. The proceeding to condemn was sustained, but there was no contention that the premises which had been conveyed and which ran outshore of the bulkhead line could be taken without compensation. The City has repeatedly instituted condemnation proceedings to take premises along the water front which had been conveyed and which ran outshore of the bulkhead line. To assert a right of resumption of title, or to override grants, as stated in the City's brief, upon the ground that every private right outshore of the bulkhead line is subordinate to the rights of the public and subject to public regulations so as to destroy the obligations of the grants is to ignore rights and titles representing the investment of millions of dollars in water front property in the City of New York and the consistent recognition of titles which has taken place in a great number of actual condemnation proceedings. See, for example, cases where pier rights were involved.

*Matter of Mayor*, Pier 39 East River, 168 N. Y.  
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*Matter of City of New York*, Old Piers Nos. 19  
and 20, 117 App. Div. 553

*Matter of City of New York*, Old Piers Nos. 16  
and 17, 138 App. Div. 186.

In *Matter of City of New York*, 143 App. Div. 515, the condemnation proceeding was to acquire for ferry purposes the land between the streets out to the pierhead line established by the Secretary of War.

The inconsistency of the City's argument is shown in the statement (Brief on Reargument, p. 23) that if it built the proposed pier over plaintiffs' premises between West 40th and West 41st Streets, shown on the map opposite page 62 in the record in No. 16, it would be obliged to condemn and pay. If this is so, what becomes of the public right to which the plaintiffs' title and rights are said to be subordinate? The City's argument seems to be that the plaintiffs' premises belong to the plaintiffs if the City builds a pier over them but do not belong to the plaintiffs so that they can build their own structure! The City is to pay if it builds the pier but if it prefers to keep the plaintiffs' premises open and use them for the benefit of the adjoining piers and to prohibit the plaintiffs from making any profitable use of their property, the City need pay nothing. This rather remarkable contention seems to ignore the obvious point that if the plaintiffs' title and rights are of such a character that in the case of the supposed pier the City would have to condemn and pay, then the conveyances to the plaintiffs are plainly such that the obligations of the grants cannot be impaired under the subsequent State legislation which the City invokes in preventing the plaintiffs from making improvements and enjoying the profitable use of their property and in treating their premises as nothing but basins or slips appurtenant to the City's piers and as being for the exclusive use of the City and its lessees.

**Second:** The City, in its second point, (Brief on Reargument, p. 23) contends that "questions concerning the rights of grantees of land under navigable waters are purely local."

Undoubtedly, it is well established that "the right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation"; that "the character of the State's ownership in the land and in the waters is the full proprietary right"; and that the State as absolute owner may in conveying tide lands grant or withhold rights in the adjoining water area. Whether its conveyances of land abutting upon navigable water does confer upon the grantee a right or interest in those waters or in the land under the same is a matter of local law. (*Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 55, 63; *Shively v. Bowlby*, 152 U. S. 1, 40; *United States v. Holt State Bank*, decided by this court February 1, 1926).

But when the State, or the City under its authority, definitely conveys land under water along the shore, to which it has full title, for beneficial enjoyment and for a valuable consideration, in aid of the development of the waterfront the State has no right, any more than in other cases, to repudiate the conveyance and impair its obligations. Grants of waterfront property are not excepted from the Constitutional inhibitions against the impairment of the obligations of contract and the deprivation of property without due process of law. The reference to local law as to riparian rights is always subject to the condition that the rules of the State "do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." *Packer v. Bird*, 137 U. S. 661, 669.

Where the State has defined the *ripa*, and conveyances under its authority have been made for value of definitely described premises within the area thus laid out, where these deeds convey title in fee simple as in this case, they are just as much within the protection of the Federal Con-

stitution as any other grants. The validity and effect of subsequent State legislation overriding titles and rights thus conveyed are not left to State Courts, and certainly their decisions sustaining such State legislation can gather no force by ascribing the result to Federal action when in truth there has been no Federal action justifying interference with the private right to fill in solidly to the bulkhead line and to build open piled structures to the boundary of the grants within the pierhead line.

**Third:** The City contends that its piers and sheds are lawfully maintained. (Brief on Reargument, p. 28).

They are within the lines of the streets but they are not open to the public as contemplated by the grants. The plaintiffs are denied access as these piers are shedded and fenced in and maintained for the exclusive use of the City's lessees.

The point is that the City has not only built piers within the street lines but, claiming under the State legislation subsequent to the grants, the City prohibits the plaintiffs from using the intervening spaces between the streets, the premises conveyed by the plaintiffs' deeds, and appropriates these spaces to the use of the adjoining piers under the City's leases. There is no question about this. Thus the amended answer of the City in this case (*Record* No. 15, p. 74, fols. 220, 221) expressly admits the allegations in paragraphs CXXV, CXXVI, CXXVII and CXXVIII of the amended complaint. These allegations (*id.*, pp. 57, 58, fols. 168-173) set forth the leasing of the southerly side of the 41st Street pier and the use of the half slip or basin adjoining. And paragraph CXXVIII (*id.*, p. 58, fol. 173)

alleges, and it stands admitted (fol. 221) that the City "has frequently from time to time since the construction of said pier, made other leases and permits for the use of plaintiffs' premises as and for a half slip or basin adjacent to said pier". What is admitted as to this pier is also true with respect to the other piers. In aid of this use of the plaintiffs' premises, the City has excavated and dredged them (see Finding of Fact No. (29); *id.*, p. 181, fol. 542). Having dredged the plaintiffs' premises to make this possible, vessels occupy them as basins appurtenant to the piers, from which the City is thus able to derive large rentals and profits (*id.*, p. 181, fol. 543). The property which the plaintiffs own and are prevented from using is appropriated to the exclusive use of others. The fenced-in pier is shown in the photograph, Plaintiffs' Exhibit No. 88 (*id.*, p. 505). The use that is made of plaintiffs' premises after they have been dredged, for the mooring of vessels alongside of the leased piers is shown in the photograph, Plaintiffs' Exhibit 86 (*id.*, p. 501).

**Fourth:** The City seeks to justify the dredging of the plaintiffs' premises by saying that it was to facilitate navigation (Brief on Reargument, p. 30).

But this is not the case of the owner of the bed of navigable waters subject to public improvements in the interest of navigation. This is the case of conveyances in fee simple absolute of premises along the shore to be gained out of the river and used as waterfront property. It could be covered with structures. So far as Federal action was concerned it could still be covered with structures, solid to a given line and beyond that with open piled structures such

as wharves or piers. The plaintiffs were granted wharfage and all advantages accruing on the exterior line of the City and on the westerly side of the premises conveyed.

Originally, the shore line of the Hudson River at this point ran in nearly as far as Eleventh Avenue (Plaintiffs' Exhibit 1, *id.*, p. 365). It is found as a fact by the State court that along the bulkhead line, which is 150 feet west of Twelfth Avenue, the plaintiffs' premises "have been dredged from a depth of 3 feet to a depth of 20 feet below mean low water (*id.*, p. 194, fol. 582). Thus the "navigation" has been made possible by removing the soil which was conveyed to the plaintiffs.

These mud flats were conveyed in fee simple absolute for a valuable consideration and for beneficial use, subject only to Federal action, the grantees taking valid title with rights of improvement and enjoyment of which they could be divested by the State only by the exercise of the power of eminent domain. Surely, the State cannot enlarge its authority and justify appropriation to the use of others without making compensation by dredging out the premises for such use and then claiming them as navigable waters.

**Fifth:** Finally, the City contends that the decision of the Court of Appeals does not carry with it approval of the conclusions of law of the Appellate Division (Brief on Reargument, p. 30).

We refer to what we have said on this point in our principal brief on this reargument (pp. 18 *et seq.*). This is not a case of conclusions that were not pertinent or were not necessary. The questions before the Court of Appeals were only questions of law. The Court of Appeals did not

disagree with or disapprove the conclusions of law of the Appellate Division. On the contrary the Court of Appeals not only impliedly by its affirmance but expressly in its opinion approved these conclusions.

The nature of the plaintiffs' title and the extent of their rights both inshore and outshore of the Federal bulkhead line were in issue, had been litigated and determined. As to the portion of the premises inshore of the bulkhead line, the Court of Appeals manifestly agreed with the conclusions of the Appellate Division, for the Court of Appeals said that the title which the City had conveyed could not be divested without compensation (*Record* No. 15, pp. 568, 569). In its brief on the former argument (p. 9) the City conceded that the State Court had sustained the plaintiffs' rights inshore of the bulkhead line. Here is no variance from the conclusions of the Appellate Division.

And as to the portion of the premises outshore of the bulkhead line, the Court of Appeals (*id.*, pp. 567, 568) apparently adopted the view of the Appellate Division that in some way the Federal action in fixing the bulkhead line had deprived the plaintiffs of the right to improve their property even by structures which did not conflict with that Federal action. Holding that view, the Court of Appeals affirmed the judgment.

We are unable to see anything in the City's contentions as to the conclusions of law of the Appellate Division, unless the City is trying to get away from the explicit rulings as to the inviolability of the plaintiffs' title and rights inshore of the Federal bulkhead line, although these rulings were clearly affirmed by the Court of Appeals as otherwise there would be no meaning in the reiterated statements in the opinion of the Court of Appeals that the City could not

retake the property by the exercise of the police power without compensation or carry out its plan without reacquiring the title.

### **No. 16. Appleby v. Delaney.**

We see no reason to add to what we have said as to the Federal question in our principal brief.

The plaintiffs' contention as to the construction of the grants, which the City's counsel seeks to dismiss so summarily (Brief on Reargument, No. 16, p. 7) is the contention explicitly upheld by the Court of Appeals in the first *Duryea* case (62 N. Y., pp. 596, 597) and the contrary of which was said to be "quite inconceivable" in the second *Duryea* case (96 N. Y., p. 496). The Court of Appeals in those cases was unable to adopt a construction that the purchase was burdened with a condition "that it should be enjoyed only by the permission of the grantor" (*id.*).

The City now raises the additional point that the plaintiffs' application with respect to their improvement was made to the Commissioner of Docks and not to the Common Council, as said to be required by the grants and the ordinance. But we might reply not only that no permission is required under the grants in the sense for which the City contends, but that the Common Council of the ordinance and the grants no longer exists. The only permission required under the Greater New York Charter is that of the Department of Docks. And the only permission required that is consistent with the grants is the ordinary permit required for all building operations or excavations within the City's limit in order to insure safeguards against accidents and the usual police supervision.



When application was made to the Department of Docks representing the City in matters relating to the waterfront, the City refused solely on the ground that it had amended its plan under legislation subsequent to the plaintiffs' grants by moving the bulkhead line further inshore. The plaintiffs protested against this as an invasion of its constitutional rights. It was not asserted in this proceeding in any of the State Courts that the plaintiffs had applied to the wrong body or department. Such a contention, it is believed, would have had scant attention by the State Courts familiar with the City's charter.

On the other hand, the contention that the grants, which were made by the Common Council directly—the body then competent to give permission if it were required—and which did not refer to the prior ordinance or incorporate it—were subject to the arbitrary authority of the City to deny at its pleasure all beneficial enjoyment under the grants, is, we submit, wholly without merit. The outstanding fact is that the State Court by its decision has enabled the City to carry out the plan it pleaded in the proceeding—a plan resting on State legislation subsequent to and impairing the obligation of the grants.

New York, February 8th, 1926.

Respectfully submitted,

CHARLES E. HUGHES,  
BANTON MOORE,  
of Counsel for Plaintiffs-in-Error.

2

James Earl Ray, Jr., 441 West 14th Street, New York City, N.Y.



# Supreme Court of the United States

EDGAR S. APPLEBY and JOHN  
S. APPLEBY, individually and  
Executors of the Last Will  
and Testament of CHARLES  
E. APPLEBY, deceased,

Petitioners,

against

THE CITY OF NEW YORK and  
others,

Respondents.

## **Brief in opposition to petition for Writ of Certiorari.**

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### **STATEMENT.**

(References are to the Record before the Court of Appeals of the State of New York).

The petitioners, through grants to their predecessors in title from The City of New York (Exhibits 4 & 5, pp. 367 to 387) acquired title to certain land under the waters of the Hudson River between 39th and 40th Streets and 40th and 41st Streets, in the Borough of Manhattan, City of New York. These grants extended from the original high water line to

the proposed 13th Avenue, which had been laid out over the water pursuant to an act of the legislature (See maps pp. 369 and 379).

Each of these grants contained the following provisions:

“And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, four good and sufficient Bulk-heads, Wharves, Streets and Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Thirty-ninth and Fortieth Streets as fall within the limits of the premises above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.” (fols. 1111-1113; 1143-1145)

“And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second

part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose." (fols. 1119-1120; 1151-1152).

"And it is hereby further agreed by and between the parties to these presents, and the true intent and meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title of interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York." (fols. 1122-1123; 1155-1156).

The petitioners or their predecessors in title made the streets and filled in the lands between them out to about the easterly or inshore line of 12th Avenue (fol. 530) and the land so filled

in is not here in controversy. Beyond the easterly line of 12th Avenue, the land granted is still covered with water.

The title which the City conveyed to the petitioners' predecessors in title came to the City in part by grant from colonial governors and in part by grant from the State of New York (fols. 514 to 521).

The City of New York, at its own expense, has built piers at the foots of 39th, 40th and 41st Streets, within the prolonged lines of these streets, title to which was reserved to the City in the grants to petitioners' predecessors (fols. 1103-1104, 1142). The City has leased these piers, and its lessees have been mooring vessels at the sides of these piers over the petitioners' land under water. The City has also dredged the spaces between the piers to facilitate the navigation of vessels (fols. 542-543). The floating of vessels over petitioners' land under water and the dredging of the slips constitute the injuries complained of.

The petitioner sued to enjoin the acts of the City and its lessees, and the Courts of New York have, with an unimportant exception hereinafter noted, denied them relief. The decision was based upon the construction of the grants to petitioners' predecessors, and upon the right of the public authorities to regulate the use of the waterfront.

See opinion of the Court of Appeals attached to the petition; reported 235 N. Y. 351.

It further appears that in 1890 the Secretary of War, acting under authority of Congress, established a bulkhead line parallel with and 150

feet westerly of the westerly line of 12th Avenue (fols. 577-578). The Secretary subsequently established a pierhead line 700 feet outshore of the bulkhead line and entirely outshore of the property in controversy (fol. 544; see map, page 529).

Pursuant to the provisions of Section 6 of Chapter 574 of the laws of New York of 1871, certain officials, acting on behalf of the State of New York, adopted a plan for the improvement of the waterfront at the locality in question, by which plan a bulkhead line or line of solid filling, parallel with and 150 feet westerly from the westerly line of 12th Avenue, was established. (fols. 576-578). This line is coincident with that of the Secretary of War. The plan also provided for a pierhead line 500 feet beyond the bulkhead line, and for piers 80 feet in width at the foot of 39th Street, 40th Street and 41st Street, extending westerly from the bulkhead line to the pierhead line, and for slips or basins between the piers (Exhibit 11, p. 391).

By the establishment of the bulkhead line, under the authority of both the Federal and State governments, a limit was placed upon the extent to which anyone might place solid filling in the waters of the River, and by the adoption of the plan providing for the location and widths of the piers, a limit was placed upon the right to erect such structures.

Summarizing the situation, we find that the City of New York owns the land under water within the prolonged lines of the three streets, and the petitioners own the lands under water between the streets. A bulkhead line has been



laid down by concurrent authority of the Federal and State governments about 250 feet outshore of the present line of solid filling. All are agreed that solid filling may be carried out to that line without violating any regulation of either government. The Federal government has also laid down a pierhead line 700 feet outshore of the bulkhead line. Between the bulkhead line and the pierhead line, the State has undertaken further to regulate the building of wharf and pier structures. It has provided that piers shall be built only at the foots of the streets. It so happens that the State's regulation requires the building of piers on the city's property, and forbids the building of any structures on petitioner's property beyond the bulkhead line. The city has built the piers on its property. The waters covering petitioners' property, beyond the bulkhead line, are thus part of the navigable waters of the river, which the Courts of New York have held may be used by vessels making fast to the city's piers, and may be dredged to facilitate navigation.

#### **POINT I.**

**There has been no erroneous interpretation of any law of The United States by the Courts of New York.**

The petitioners contend that a Federal question is raised because the construction of the act of Congress authorizing the Secretary of War

to establish harbor lines is involved. The fact of the establishment of harbor lines by the Secretary of War, and the legal effect of the same, is conceded by all parties. All parties agree that none of them may fill with solid filling beyond the bulkhead line established by the Secretary of War, and that none of them may construct piers extending beyond the pier-head line established by him. There is no controversy whatever respecting the meaning, scope, or effect of any act of Congress.

## POINT II.

**No question respecting the taking of property or the impairment of the obligation of a contract is involved in this case.**

The Courts of New York have held that the title of the City of New York, and therefore the title of the petitioners, to the land under the waters of the Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the waterfront.

The determination with respect to the nature of the title follows similar decisions made in prior cases, which will be referred to under Point II *infra*.

Upon the question of regulation, it is manifest that there must be some control by the public authorities of the right to fill in navigable waters and the building of piers and wharves. This

control ordinarily takes the form of establishing harbor lines, bulkhead lines to limit the extent of solid filling, and pier lines to limit the extent, width and location of piers.

As we have stated, the Secretary of War, acting under the authority of Congress, in 1890, established a bulkhead line 150 feet west of the westerly side of 12th Avenue and approximately 250 feet west of the present line of solid fill. The petitioners concede that they are bound by this line and may not fill beyond it. This concession is based upon numerous decisions of this Court, some of which are

*Scranton vs. Wheeler* 179 U. S. 141, 163,  
*Cummings vs. Chicago* 188 U. S. 410,  
*Calumet Grain Co. vs Chicago*, 188 U. S.  
 431,

*Greenleaf Lumber Co. vs. Garrison* 237  
 U. S. 251.

The Courts of New York have restrained the City and the other defendants from interfering with the petitioners' rights inshore of the bulkhead line, (Fols. 606, 1662), and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line.

The only regulation by the Federal government outshore of the bulkhead line is the pierhead line established by the Secretary of War, a considerable distance beyond the lands in controversy, (fol. 544, maps pp. 529, 531). This is a line limiting the outer extremity of the piers

to be built. The petitioners base no complaint upon the establishment of such line.

Petitioners' sole ground of complaint is the establishment, by the state authorities, inshore of the Federal pier line, of limitations respecting the width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The petitioners complain that they are thus deprived of their property, and that their contract rights have been impaired.

This Court has held that a state has the power to further restrict the building of piers and wharves inshore of the Federal harbor lines, and that no one may improve the waterfront without complying with the regulations of both the Federal and the State governments.

*Montgomery vs. Portland* 190 U. S. 89.

Manifestly, there must be some regulation of the width of piers and the distances between them. When the Secretary of War established the pier line 700 feet outshore of the bulkhead line, this was done in order to permit the building of long piers and the mooring of vessels at the sides of the piers. If there were no restriction with respect to the location or width of piers, the entire space between the bulkhead and pierhead lines might be covered by wharf structures, thus effectually preventing the use of any part of them other than their outshore ends. The determination of the questions respecting the location of piers and the spaces between them has been left to the State, and the State has provided the necessary regulations.

It follows from the nature of the title of the petitioners and the undoubted power of the public authorities to regulate the use of navigable waters, that no legal injury has been done to the petitioners.

The petitioners admit that they are bound by the lines laid down by Congress through the instrumentality of the Secretary of War. Why then are they not equally bound by the regulations of the State of New York through the instrumentality of the officials selected by its legislature?

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable waters is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation. If one owner gains and another loses by the exercise of the State's regulatory power, this is merely incidental. All general regulations similarly help one and hurt another. The only proper consideration in matters of this kind is for the needs of the general public. The State's power, within its proper sphere, must be as great as that of the Federal government. True, the State may not permit improvement where the Federal government forbids. But the State may further restrict within the area as to which the Federal government has manifested its indifference. No one may fill in beyond the Federal bulkhead line. But the State may prohibit filling even farther inshore. No one may extend a pier beyond the Federal pierhead line. But the State

may say that, within such line, the piers must be so far apart or only in certain specified locations.

A case closely analogous to the case at bar is *Greenleaf Lumber Co. vs. Garrison* 237 U. S. 251. There it appeared that the complainant had constructed an improvement in the waters of the Elizabeth River consisting of two fills, with the outer extremities connected, thus making a three sided wharf with a log pond in the centre. This improvement was entirely inshore of a harbor line adopted by the Secretary of War in 1890. In 1911 the Secretary established a new line farther inshore, cutting off about 200 feet of complainant's structure. This Court held that that the complainant was obliged to comply with the new line and remove the portions of his wharf extending beyond it, and that the action of the public authorities was not a taking of property, but the lawful exercise of a governmental power for the common good.

So, in the case at bar, no property of the petitioners has been taken. Their grants from the City have not been impaired. They have merely been construed to be subject to the regulatory power of the Federal and State governments. This doctrine has already received the approval of this Court in the *Greenleaf Lumber Co.* case *supra*, and if it had not, it is sufficiently supported by reason to survive the test applied in cases of contract impairment.

"In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the

contract set up and whether its obligation has been impaired by the State enactment, *Douglas vs. Kentucky* 168 U. S. 488, 502, 'the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt', a principle reinforced by the later cases".

*Tampa Water Works vs. Tampa* 199 U. S. 241, 243-244.

"Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the State decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

*Southern Wisconsin Ry. vs. Madison*  
240 U. S. 457, 461.

### POINT III.

**There has been no change in the decisions of the State Courts upon the questions here involved.**

There is nothing new in the doctrine announced by the Court of Appeals in the case at bar that the title of the City of New York and its grantees in the lands under water here in

question is not absolute and unqualified but is subject to the rights of the public. This doctrine had been previously announced in *Knickerbocker Ice Co. vs. Forty-Second Street R. Co.* 176 N. Y. 408, as follows:

"There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First.* The title of The City of New York in the tideway and submerged lands of the Hudson River granted under the Dongan and Montgomerie Charters, and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway." (176 N. Y. p. 417)

This doctrine was reiterated in almost the same words in *American Ice Co. vs. The City of New York* 217 N. Y. 402 at p. 405.

In *Coze vs. The State*, the Court of Appeals stated:

"The title of the State to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public, of which the state is powerless to divest itself." (144 N. Y. at pp. 405 to 406).

Moreover, the case at bar finds an exact pre-



cedent in *People vs. N. Y. & S. I. Ferry Co.* 68 N. Y. 71. In that case, the defendant claimed lands under water under a grant made by the State, pursuant to certain acts of the legislature. Before the defendant had constructed any improvements, the legislature passed a law providing that no pier might be built within 100 feet of another pier. The defendant constructed a pier upon the land granted to it, within 100 feet of a similar structure upon the adjoining property. The Court of Appeals held that the construction of such pier was in violation of the State law, and that the State might require its removal. It was pointed out that the grant to defendant's predecessors did not exclude the exercise by the State of governmental control of the waters as a public highway, and that, if the State, in exercising this control, restricted the grantee in his use of the property, it was not in contravention of the grant.

See also *Matter of Public Service Commission*, 224 N. Y., 211.

The petitioners contend that a different rule is to be found in other cases decided by the Court of Appeals, for example, *Langdon vs. The Mayor* 93 N. Y. 129 and *Williams vs. The Mayor* 105 N. Y. 419. In these and similar cases it appeared that the lands granted *had been fully filled in*, and had thus ceased to be within the domain of the regulatory power over navigable waters. The decisions last above referred to apply, for example, to the land of the petitioners east of 12th Avenue, which we admit neither the State nor the City has the power to disturb. In the case at bar, Judge Pound, referring to this line of cases, said:

"Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is *dictum* (*People v. Steeplechase Park Co.*, 218 N. Y. 459; *Langdon v. Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes. (Citing cases)" 235 N. Y. at page 362.

If a Federal question arose every time a State Court refused to follow its own prior *dictum*, what would be the condition of the docket of this Court?

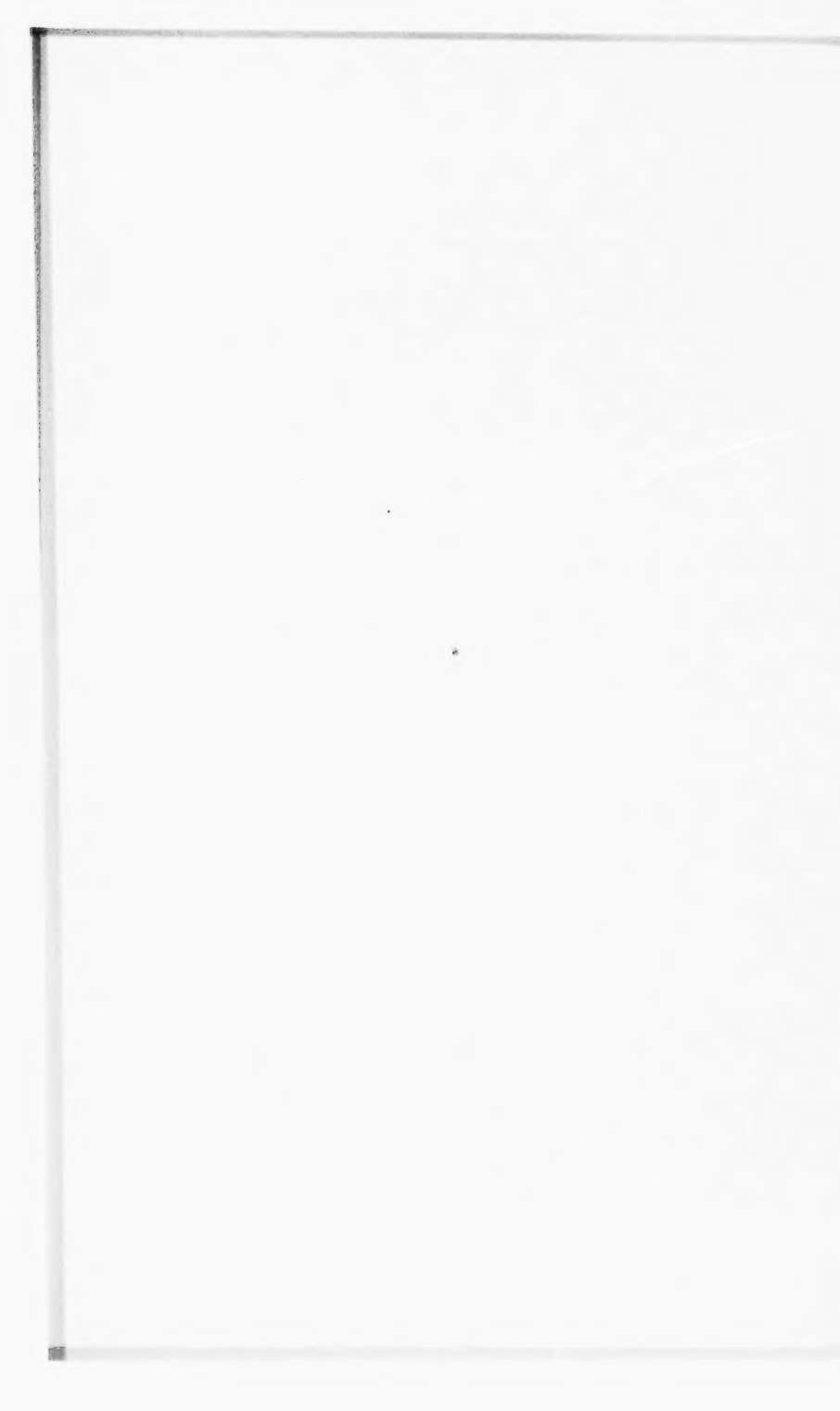
*The petition for the writ of certiorari herein should be denied.*

New York, September, 1923.

Respectfully submitted,

GEORGE P. NICHOLSON,  
Corporation Counsel,  
Attorney for the City of New York.

CHARLES J. NEHRBAS,  
of Counsel.



(20176)

FILED  
OCT 6 1925

WM. H. STANSEL  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1925—No. 15.

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EDGAR S. APPLEBY and JOHN S. APPLEBY, individ-  
ually and as executors of Charles E. Appleby, deceased,  
*Plaintiffs-in-error,*  
*against*

THE CITY OF NEW YORK, *et al.,*  
*Defendants-in-error.*

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**BRIEF ON BEHALF OF THE CITY OF NEW YORK,  
DEFENDANT-IN-ERROR.**

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GEORGE P. NICHOLSON,  
*Corporation Counsel.*

CHARLES J. NEHRBAS,  
*Of Counsel.*



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# Supreme Court of the United States

No. 15.

OCTOBER TERM, 1925.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors of the last will and testament of CHARLES E. APPLEBY, deceased,  
Plaintiffs-in-Error,

*vs.*

THE CITY OF NEW YORK, *et al.*,  
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
NEW YORK.

## BRIEF ON BEHALF OF THE CITY OF NEW YORK, DEFENDANT-IN-ERROR.

In addition to the writ of error, the plaintiffs-in-error filed, at the October, 1923, term, a petition for a writ of certiorari. The court deferred consideration of such petition until the hearing upon the writ of error.

Plaintiffs-in-error seek to review a judgment of the Supreme Court of the State of New York (R., pp. 551-552) entered upon an order of the Appellate Division of that

court (R., pp. 549-551). The judgment so entered has been affirmed by the Court of Appeals of New York (R., pp. b-c). The order of the Court of Appeals affirming the judgment below has been, according to the practice, made the order and judgment of the Supreme Court (R., pp. a-b).

The judgment sought to be reviewed modifies and affirms a judgment of the Special Term of the Supreme Court and enjoins the defendants in error from interfering in certain particulars with the property of plaintiffs-in-error, but substantially denies the relief demanded in the complaint.

### **Statement of the Case.**

Plaintiffs-in-error, claiming to be the owners "in fee simple absolute" of certain lands under water between 39th and 40th Streets, and between 40th and 41st Streets, out-shore of Twelfth Avenue, in the Borough of Manhattan, City of New York, brought this action,

(a) to restrain the defendants from mooring, docking or floating vessels over the lands under water, and

(b) to require the removal of certain piers, sheds, etc., at the foots of 39th, 40th, and 41st Streets.

The plaintiffs also demand money damages (see Complaint, R., pp. 9-61).

The City of New York answered (R., pp. 62-84) denying the material allegations of the complaint, and setting up the establishment of harbor lines affecting the premises in question, the statute of limitations, adverse possession, and the failure of the plaintiffs to comply with the conditions contained in their grants from the City.

The premises in question are under the waters of the Hudson River, on the westerly side of Manhattan Island.

By Chapter 182 of the Laws of New York of 1837, Thirteenth Avenue, as laid out on a certain map made by George B. Smith was declared to be the permanent exterior street or avenue in the City of New York, along the easterly shore of the Hudson River, between the southerly line of Hammond Street and the northerly line of 135th Street, and the City of New York was vested with all the right and title of the people of the State to the lands under water extending from the westerly line of the lands theretofore granted to the westerly line of Thirteenth Avenue as so laid out (R., pp. 172-174).

The title to the premises in question was thus vested in the City of New York. This is alleged in the complaint (R., pp. 12-13) and is not disputed.

On or about the 24th day of December, 1852, the City issued to one Robert Laton a water grant covering lands under water between Fortieth and Forty-first Streets from the high water mark of the Hudson River out to Thirteenth Avenue, established by Chapter 182 of the Laws of 1837 (Pltff.'s Ex. 5; R., pp. 378-387; Finding, R., pp. 182-191).

The grant contains the following pertinent provisions:

“Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions of the Twelfth and Thirteenth avenues and Fortieth and Forty-first streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned” (R., p. 381).

“And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part,

their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, or that may hereafter be passed or adopted, four good and sufficient Bulk-heads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Fortieth and Forty-first Streets as fall within the limits of the premises first above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof." (R., pp. 381-382.)

"And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose." (R., p. 384.)

"And it is hereby further agreed by and between the parties to these presents, and the true intent and

meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York." (R., pp. 385-386.)

Subsequently, on the first day of August, 1853, a similar grant was issued to Charles E. Appleby of the lands under water between Thirty-ninth and Fortieth Streets, from the high water mark out to Thirteenth Avenue (R., pp. 367-377; Finding, p. 191).

The title of the plaintiffs comes down from these grants (R., pp. 191-192).

In 1890, the Secretary of War, acting under authority of Congress, established a bulkhead line parallel with and 150 feet to the west of the westerly line of Twelfth Avenue (R., p. 193). The Secretary has also established a pierhead line 700 feet to the west of the bulkhead line, which pier line is beyond Thirteenth Avenue and wholly outshore of the premises in controversy (R., p. 182; see map, p. 529).

Pursuant to the provisions of Section 6 of Chapter 574 of the laws of New York of 1871, certain officials, acting on behalf of the State of New York, adopted a plan for the improvement of the waterfront at the locality in question, by which plan a bulkhead line or line of solid filling was established coincident with the bulkhead line of the Secretary of War (R., p. 193). The plan of the state authorities also provided for a pierhead line 500 feet beyond the bulkhead

line, and for piers 80 feet in width at the foots of 39th, 40th and 41st Streets, extending from the bulkhead line to the pierhead line, and for slips or basins between the piers (Ex. 11, p. 391).

By the establishment of the bulkhead line, under authority of both the Federal and State governments, a limit was placed upon the extent to which anyone might place solid filling in the waters of the River, and by the adoption of the plan providing for the location and widths of the piers, a limit was placed upon the right to erect such structures.

The plaintiffs or their predecessors in title have made the streets and filled in the lands, as provided in the grants from the city, as far out as the easterly or inshore line of 12th Avenue (R., p. 177). The land so filled is not here in controversy. Beyond the easterly line of 12th Avenue, the land granted is still under water. The controversy deals with this submerged land.

The City of New York, at its own expense, has built piers at the foots of 39th, 40th and 41st Streets, as provided for in the plan heretofore referred to (R., pp. 180, 181, 192). The land under water covered by these piers was reserved from the grants made to plaintiffs' predecessors (R., pp. 368, 381). The city has leased these piers and its lessees have been mooring vessels at the sides of the piers over the plaintiffs' land under water (R., pp. 465-487). The City has also dredged the spaces between the piers to facilitate the navigation of vessels (R., p. 181). The floating of vessels over plaintiffs' land under water and the dredging of the slips constitute the injuries complained of.

In the court of original jurisdiction, the Special Term of the Supreme Court, the city was enjoined from dredging the slips and from doing other acts not now in controversy

(R., p. 202). The opinion of the Special Term is printed at pages 356-362).

Both parties appealed to the Appellate Division of the Supreme Court, where the judgment was modified by eliminating the provision enjoining the city from dredging west of the established bulkhead line, and in all other respects affirmed (R., pp. 551-552). The opinion of the Appellate Division is printed at pages 555-563 and is reported in 199 N. Y. App. Div. 539.

Both parties again appealed to the Court of Appeals, where the judgment was affirmed (R., pp. b-c). The opinion of the Court of Appeals is printed at pp. 565-569 and is reported in 235 N. Y. 351.

Summarizing the situation, we find that the City of New York, deriving its title from the State, has granted to the plaintiffs' predecessors the land under water between 39th and 40th Streets, and between 40th and 41st Streets, and has reserved to itself the land under water within the prolonged lines of the streets. A bulkhead line has been established by concurrent action of the Federal and State authorities, which limits solid filling at a point 150 feet west of Twelfth Avenue. Beyond the bulkhead line, and within the pierhead line established by the Federal Government, the State has provided that piers shall be built only within the prolonged lines of the streets. The State's regulation permits the building of piers on the city's property and prohibits the building of any structures on the plaintiffs' property beyond the bulkhead line. The city has built the piers on its property. The waters covering the plaintiffs' intervening property, beyond the bulkhead line, are part of the navigable waters of the river. The courts of New York have held that these waters may be navigated by vessels making fast to the city's piers, and may be dredged to facilitate navigation.



## POINT I.

**There has been no erroneous interpretation of any law of the United States by the Courts of New York.**

The plaintiffs-in-error contend that a Federal question is raised because the construction of the Act of Congress authorizing the Secretary of War to establish harbor lines is involved. The fact of the establishment of harbor lines by the Secretary of War, and the legal effect of the same, are conceded by all parties. All parties agree that none of them may fill with solid filling beyond the bulkhead line established by the Secretary of War, and that none of them may construct piers extending beyond the pierhead line established by him. There is no controversy whatever respecting the meaning, scope, or effect of any act of Congress.

## POINT II.

**No question respecting the taking of property or the impairment of the obligation of a contract is involved in this case.**

The Courts of New York have held that the title of the City of New York, and therefore the title of the plaintiffs, to the land under the waters of the Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the waterfront.

The determination with respect to the nature of the title follows similar decisions made in prior cases, which will be referred to under Point III, *infra*.

Upon the question of regulation, it is manifest that there must be some control by the public authorities of the right to fill in navigable waters and the building of piers and wharves. This control ordinarily takes the form of establishing harbor lines, bulkhead lines to limit the extent of solid filling, and pier lines to limit the extent, width and location of piers.

As we have stated, the Secretary of War, acting under the authority of Congress, in 1890, established a bulkhead line 150 feet west of the westerly side of 12th Avenue and approximately 250 feet west of the present line of solid fill. The plaintiffs concede that they are bound by this line and may not fill beyond it. This concession is based upon numerous decisions of this Court, some of which are

*Scranton v. Wheeler*, 179 U. S. 141, 163;

*Cummings v. Chicago*, 188 U. S. 410;

*Calumet Grain Co. v. Chicago*, 188 U. S. 431;

*Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251.

The Courts of New York have restrained the City and the other defendants from interfering with the plaintiffs' rights inshore of the bulkhead line (R., pp. 551-552), and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line.

The only regulation by the Federal government outshore of the bulkhead line is the pierhead line established

by the Secretary of War, a considerable distance beyond the lands in controversy (R., p. 182, maps pp. 529, 531). This is a line limiting the outer extremity of the piers to be built. The plaintiffs base no complaint upon the establishment of such line.

Plaintiffs' sole ground of complaint is the establishment, by the State authorities, inshore of the Federal pier line, of limitations respecting the width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The plaintiffs complain that they are thus deprived of their property, and that their contract rights have been impaired.

This Court has held that a state has the power to restrict the building of piers and wharves where the Federal government has made no restrictions, or where the State's regulations do not conflict with those of the United States.

*Montgomery v. Portland*, 190 U. S. 89.

Manifestly, there must be some regulation of the width of piers and the distances between them. When the Secretary of War established the pier line 700 feet outshore of the bulkhead line, this was done in order to permit the building of long piers and the mooring of vessels at the sides of the piers. If there were no restriction with respect to the location or width of piers, the entire space between the bulkhead and pierhead lines might be covered by wharf structures, thus effectually preventing the use of any part of them other than their outshore ends. The determination of the questions respecting the location of piers and the spaces between them has been left to the State, and the State has provided the necessary regulations.

It follows from the nature of the title of the plaintiffs and the undoubted power of the public authorities to regulate the use of navigable waters, that no legal injury has been done to the plaintiffs.

The plaintiffs admit that they are bound by the lines laid down by Congress through the instrumentality of the Secretary of War. Why then are they not equally bound by the regulations of the State of New York through the instrumentality of the officials selected by its legislature?

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable waters is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation. If one owner gains and another loses by the exercise of the State's regulatory power, this is merely incidental. All general regulations similarly help one and hurt another. The only proper consideration in matters of this kind is for the needs of the general public. The State's power, within its proper sphere, must be as great as that of the Federal government. True, the State may not permit improvement where the Federal government forbids. But the State may further restrict within the area as to which the Federal government has manifested its indifference. No one may extend a pier beyond the Federal pierhead line. But the State may say that, within such line, the piers must be so far apart or only in certain specified locations.

A case closely analogous to the case at bar is *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251. There it appeared that the complainant had constructed an improvement in the waters of the Elizabeth River consisting of

two fills, with the outer extremities connected, thus making a three sided wharf with a log pond in the centre. This improvement was entirely inshore of a harbor line adopted by the Secretary of War in 1890. In 1911 the Secretary established a new line farther inshore, cutting off about 200 feet of complainant's structure. This Court held that the complainant was obliged to comply with the new line and remove the portions of his wharf extending beyond it, and that the action of the public authorities was not a taking of property, but the lawful exercise of a governmental power for the common good.

So, in the case at bar, no property of the plaintiffs has been taken. Their grants from the City have not been impaired. They have merely been construed to be subject to the regulatory power of the Federal and State governments. This doctrine has already received the approval of this Court in the *Greenleaf Lumber Co.* case *supra*, and if it had not, it is sufficiently supported by reason to survive the test applied in cases of contract impairment.

“In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the contract set up and whether its obligation has been impaired by the State enactment, *Douglas vs. Kentucky*, 168 U. S. 488, 502, ‘the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt’, a principle reinforced by the later cases.”

*Tampa Water Works v. Tampa*, 199 U. S. 241,  
243-244.

“Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their

constitutional rights under the guise of construction, still the mere fact that without the State decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

*Southern Wisconsin Ry. v. Madison*, 240 U. S. 457, 461.

### POINT III.

**There has been no change in the decisions of the State Courts upon the questions here involved.**

There is nothing new in the doctrine announced by the Court of Appeals in the case at bar that the title of the City of New York and its grantees in the lands under water here in question is not absolute and unqualified but is subject to the rights of the public. This doctrine had been previously announced in *Knickerbocker Ice Co. v. Forty-Second Street R. Co.*, 176 N. Y. 408, as follows:

"There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First*: The title of the City of New York in the tideway and submerged lands of the Hudson River granted under the Dongan and Montgomerie charters and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. (*Sage v. Mayor, etc. of N. Y.*, 154 N. Y. 70; *Matter of City of N. Y.*, 168 N. Y., 139.) *Second*: The title of the city of New York in and to the lands within its public streets is held in trust for the public use. (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122;

*Kane v. N. Y. El. R. R. Co.*, 125 N. Y., 165). *Third*: The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure. (*People v. Lambier*, 5 Denio 9; *Matter of City of Brooklyn*, 73 N. Y. 179). *Fourth*: It was competent for the legislature in granting additional submerged lands to the city of New York in 1837, to prescribe that such lands should be used for the purposes of an exterior street, to which other streets then intersecting the river should be extended."

176 N. Y., p. 417.

In

*American Ice Co. v. City of New York*, 217 N. Y., 402,

the same property was involved as in the case of *Knickerbocker Ice Co.* (*supra*). The Court's opinion contains the following discussion of the nature of the property rights in the land under water.

"A large number of the facts found relating to the title and interest of the city were reviewed by this court in the earlier cases (*Knickerbocker Ice Company v. 42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408; *Matter of Mayor, etc. of N. Y.*, 193 N. Y. 503) wherein it was determined that the title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and the acts of the legislature (Laws of 1807, chapter 115; Laws 1837, chapter 182), and by grants made by the state to the city was not absolute and unqualified, but was and is held subject

to the rights of the public to the use of the river as a water highway; that the title of the city of New York in and to the lands within its public streets (including Forty-third street to which the city acquired title in 1837-1838, and was opened from the East river to the high-water mark of the Hudson river, sixty feet in width), is held in trust for the public use; that the general public has a right of passage over the places where land, highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is, by operation of law, extended by the length of the added structure; that it was competent for the legislature in granting additional submerged lands to the city of New York in 1837 to prescribe that such lands should be used for the purposes of an exterior street to which other streets then intersecting the river should be extended. (*Knickerbocker Ice Company v. 42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408, 417).''

217 N. Y., pp. 405, 406.

''The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself.''

*Cox v. State*, 144 N. Y., at pp. 405-406.

Moreover, the case at bar finds an exact precedent in *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71. In that case the defendant claimed lands under water under a grant made by the State, pursuant to certain acts of the legislature. Before the defendant had constructed any improve-



ments, the legislature passed a law providing that no pier might be built within 100 feet of another pier. The defendant constructed a pier upon the land granted to it, within 100 feet of a similar structure upon the adjoining property. The Court of Appeals held that the construction of such pier was in violation of the State law, and that the State might require its removal. From the opinion of the Court, we quote the following:

“The grant to Gore contained no words excluding the exercise by the State of governmental control of the waters above the land granted as a public highway, and if, in exercising this control, the grantee is restricted in the use of his property, it is not in contravention of the grant, but consistent with it, because the grant, by well settled words of construction was subject to the exercise of this right and attribute of sovereignty. We need not inquire what the rights of a grantee would be in respect to piers and wharves, erected under the license implied from the grant before it had been revoked, or the State had, in the exercise of its discretion, made regulations upon the subject.

The legislature, by chapter 763 of the Laws of 1857, entitled ‘An act to establish bulkhead and pier lines for the port of New York,’ established pier and bulkhead lines for the port and harbor of New York which included the premises granted to Gore. The second section is as follows: ‘It shall not be lawful to fill in with earth or other solid material in the waters of said port beyond the bulkhead line, or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of the act, and piers which shall not exceed seventy feet in width respectively with inter-

vening water spaces of at least 100 feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond or outside of said sea wall.'

When this act was passed no piers had been erected on the Gore grant, and so far as appears, there was unity of title as to the whole tract embraced therein. This act was a lawful exercise of legislative power, as a regulation for the benefit of commerce and navigation, and the owners of the Gore grant were bound to observe it, and in erecting piers to conform to its directions."

68 N. Y., at pp. 79-80.

The title of the City being limited by the regulatory power of the State and Federal Governments, it could convey to plaintiffs' predecessors no greater title. The plaintiffs, therefore, hold the property subject to regulation of its use by the Secretary of War and the State authorities.

The plaintiffs rely greatly upon the case of *People v. Steeplechase Park Co.*, 218 N. Y. 459. It was there held that the State has the power to convey such title to the foreshore as will permit the grantee to erect structures which prevent the passage of the public. There is nothing in that case which is inconsistent with our contention in the case at bar. It did not involve the question of the State's regulatory power. It does not follow, from anything that was said in that case, that the grantee would not have been obliged to conform his improvement of the lands granted to any harbor lines which might have been established. As we stated at the outset, we do not claim that the plaintiffs did not acquire a fee. They acquired as great a title as an individual can have in lands under navigable waters. But something more than a mere con-

veyance of the lands is required before it can be argued that the State has surrendered its power of regulation.

The plaintiffs also contend that a different rule is to be found in other cases decided by the Court of Appeals, for example, *Langdon v. The Mayor*, 93 N. Y. 129, and *Williams v. The Mayor*, 105 N. Y. 419. In these and similar cases it appeared that the lands granted *had been fully filled in*, and had thus ceased to be within the domain of the regulatory power over navigable waters. The decisions last above referred to apply, for example, to the land of the plaintiffs east of 12th Avenue, which we admit neither the State nor the City has the power to disturb. In the case at bar, Judge Pound, referring to this line of cases, said:

“If plaintiffs’ lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the state (*First Construction Co. v. State*, 221 N. Y. 295), but so long as they remained under water they were subject to the sovereign power of the state to regulate their use for purposes of navigation. \* \* \*

“Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is *dictum* (*People v. Steeplechase Park Co.*, 218 N. Y. 459; *Langdon v. Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for

private purposes (Citing cases)" 235 N. Y., at pages 361-362.

The plaintiffs have contended that the waters covering their lands are not navigable. References to depths of water of as little as four feet are made. They are, however, part of the Hudson River, which, we all know, is a navigable stream. Being such, the right of regulation extends to its full width. It is precisely in the more shallow portions, near the banks, that regulation is most necessary, and most frequently exercised. To hold, for example, that a bulkhead line may be placed only where the water has a certain depth, would be to deprive the governmental authorities of all discretion in the matter. It is for them to say, once it is determined that the stream, generally, is navigable, how near to the bank the limit of navigation shall be. And this limiting line, or bulkhead line, may be drawn wherever there is water, no matter how shallow. This Court, in discussing the power of Congress, has stated:

"When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed."

*Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 263.

It is quite clear, we think, that the plaintiffs have merely a naked fee with respect to the lands in question. They may not devote them to any profitable use. They lie under the navigable waters of the Hudson River. As such they may be used by the public for the purposes of navigation,

and the lessees of adjacent piers may moor vessels alongside such piers and over the plaintiffs' lands. This follows from what has heretofore been said, and was expressly decided in

*Coffin v. Scott*, 19 *Weekly Digest*, 413; aff'd 102 N. Y. 730.

The opinion in that case is not reported in full, but we have attached a copy as an appendix to this brief.

The doctrine of the New York cases on this subject is not new, and is in accordance with the decisions of this Court.

*Martin v. Waddell*, 16 Pet. 367.

*Shively v. Bowlby*, 152 U. S. 1 (see pp. 20 to 21 where the law of New York is discussed).

In the last named case the Court stated:

"The later judgments of this Court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the Constitution."

152 U. S., at p. 40.

"Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign for the benefit of the whole people."

152 U. S., at p. 57.

It has often been stated that the State may grant land under water in such a manner and under such circumstances that the grantee becomes a proprietor to the same extent as a proprietor of upland. This may be true where the land under water granted consists of shallows unsuitable for general navigation, and where the grantee has actually filled in the lands and made upland of them. This is the situation with respect to so much of the lands granted to plaintiffs' predecessors as lie east of 12th Avenue. They have been filled in and are now as much part of the upland of Manhattan Island as any other portion of that Island. No one questions this. It may be conceded, as a general proposition, that where an owner has lawfully filled in land under water with the consent of both the Federal and State authorities it becomes upland, free from the trust subject to which land under water is held, and free from the regulatory power of the State over navigable waters. Judge Pound recognized this principle in the case at bar, when he said:

"If plaintiffs' lands easterly of the bulkhead line had been actually filled in, they would no longer be lands under water, and would be free from the regulatory power of the State."

235 N. Y., at pp. 361, 362.

The consent of the Federal and State authorities is evidenced by the establishment of bulkhead lines, lines to which solid filling is permitted. By the establishment of such lines, the authorities define the limits of a navigable waterway. In permitting the conversion into upland of land under water inshore of a bulkhead line, navigation is not interfered with nor obstructed. On the contrary, it is

facilitated. Modern commerce could not be accommodated in a harbor which remained in its natural condition, with sloping beaches and mud flats along its edge. By permitting filling out to a reasonable depth of water vessels are enabled to moor alongside the shore or at piers extending therefrom.

Outshore of the bulkhead line, however, we are in navigable waters. Here, every private right is subordinate to the rights of the public. All ownership is subject to public regulation. No right, whether of ownership or otherwise, can be granted which will prevent the full and free exercise of the regulatory power of Congress and of the State.

This is all that the Courts have held in the case at bar. With respect to the filled lands inshore of the bulkhead line, it is conceded that the regulatory power no longer exists, for they are no longer part of the navigable waters of the River. They have become upland. Outshore of the bulkhead line, however, no structure may be placed without the approval of the authorities. The Secretary of War has limited the distance to which piers may be extended; the State has prescribed their location and width. This is neither a taking of property nor an infringement of the plaintiffs' granted rights. It is an exercise of sovereign power to which all land under navigable waters is subject.

*Prosser v. Northern Pacific R. Co.*, 152 U. S. 59;  
*Greenleaf Johnson Co. v. Garrison*, 237 U. S.,  
251.

## POINT IV.

**The piers and sheds at the foot of 39th, 40th and 41st Streets are lawfully maintained.**

Plaintiffs contend that the piers in question are in the beds of public streets and constitute a diversion of the same from street uses. This contention overlooks the fact that, under regulations both of the Federal and State governments, there may be no solid filling beyond a point about 150 feet west of Twelfth Avenue. Where there can be no solid filling, obviously there can be no public street.

Plaintiffs complain that we have built piers instead of a street. Any structure except a pier would be a violation of governmental regulations, a purpresture and a nuisance.

*Peo. v. Vanderbilt*, 26 N. Y., 287; 28 N. Y., 396.

The contention that the fee title of the beds of the streets was not reserved by the City at the time of making the grants is completely answered by

*The Mayor, etc., v. Law*, 6 N. Y. Supp., 628; 125 N. Y., 380;

*Burns Bros. v. City of N. Y.*, 178 App. Div., 615, aff'd., 232 N. Y., 523.

The City has the right to lease the piers.

*Matter of City of New York*, 135 N. Y. 253, 264.



## POINT V.

**The lands under water in controversy may be dredged to facilitate navigation.**

Lands under navigable waters may be dredged, to facilitate navigation, without any liability to the owner of the fee of the underlying lands.

*Lewis Blue Point Co. v. Briggs*, 198 N. Y. 287;  
aff'd. 229 U. S. 82;

*Tempel v. United States*, 248 U. S. 121.

**The judgment should be affirmed.**

New York, October, 1925.

Respectfully submitted,

GEORGE P. NICHOLSON,  
*Corporation Counsel.*

CHARLES J. NEHRBAS,  
*Of Counsel.*

# Appendix.

## SUPREME COURT,

GENERAL TERM—FIRST DEPARTMENT.

March General Term, 1884.

NOAH DAVIS, *P. J.*,  
JOHN R. BRADY, and  
CHAS. DANIELS,  
*Justices.*

EDMUND COFFIN, JR.,  
Appellant,

*against*

JOHN SCOTT, *et al.*,  
Respondents.

Appeal from judgment of the Special Term dismissing complaint.

ISIDOR GRAYHEAD, for Appellant.

S. G. McNARY, for Respondents.

DAVIS, P. J.—The defendants are lessees of a pier at the foot of West Thirty-fourth Street, on the North River, holding under a demise of the corporation of the City of New York. They are co-partners as dealers in ice, and have, under their lease from the City, occupied and used the pier for the purpose of unloading vessels bringing ice thereto,

and have used the waters of the river on the southerly side of the pier for the purpose of approaching the pier and unloading their vessels. They have also erected and occupied temporary structures on the pier for their ice-stands and offices. The plaintiff claims to recover for the wharfage or use of the pier under a grant made to him in the year 1881 by one Henry R. Dunham, Junior, who derived his title from Henry R. Dunham, deceased, to whom the City on the 16th of December, 1852, granted certain lands under water lying between property owned by said Dunham and the westerly line of the City, which then was the westerly line of Thirteenth Avenue.

According to the plaintiff's theory, the City of New York, in the year 1857, while the title of the property was in Dunham, wrongfully took possession, claiming title at and constructing the pier now demised to the defendants, to the exclusion of Dunham and in violation of his alleged rights, and have since occupied the same by their tenants, and were in such occupation by the defendants as tenants at the time of the alleged conveyance to the plaintiff. It is difficult to see how the plaintiff can maintain his action upon his own theory, because the City, as landlord of the defendants, was in possession holding adversely and in hostility to the alleged rights of his grantor at the time of the execution of the conveyance to the plaintiff, and such conveyance, as to the City and the defendants, it seems to us, would be void under the statute.

This point was not suggested on the argument, and we shall not therefore consider it in disposing of the case, although it strikes us as one to which the attention of the plaintiff's counsel may properly be drawn.

By the conveyance made by the City to Dunham the land upon which the pier leased to the defendants is constructed was expressly reserved from the grant. The language of the reservation is as follows:

“Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portion of the Thirteenth avenue and Thirty-fourth street, for the uses and purposes of public streets, avenues and highways, as hereinafter mentioned.”

The fee, therefore, of the portion of Thirty-fourth Street on which the pier is erected has remained all the while in the City, and the grant under which the plaintiff claims conveys to him no interest in such fee. This question was considered in *Langdon v. The Mayor* (93 N. Y. 129), in which it was held that a similar reservation did not have the effect of simply reserving an easement for a street, but as excepting the soil upon which it was to be constructed, from the operation of the conveyance. And in a late case before Mr. Justice Daniels at Special Term, where an injunction was sought against parties seeking to construct under the authority of the City certain docks within the line of Forty-second Street, it was held that a similar reservation in a water grant had the effect to continue the fee of the land in the City.

It is found in this case that the pier is wholly built within the lines of the street and upon the land excepted from the grant by and at the expense of the Corporation of the City of New York. It seems very clear that the plaintiff has no title or interest therein which entitles him to claim the ownership of such pier, or to demand wharfage or rent for its use.

The plaintiff owns, by virtue of his grant, the land under the waters south of the pier. The defendants show that the waters over those lands are now part of the navigable waters of the Hudson River. Neither the plaintiff nor the person through whom his title is derived has filled in or occupied those lands in any manner, nor have they been used by the defendants in any other mode or way than in approaching the pier for the purpose of unloading their cargoes and lying at the pier while discharging cargoes. The plaintiff has no legal right to exact compensation for the use of the navigable waters of the river.

In *The People v. Vanderbilt* (26 N. Y., 292), the Court says:

“The right of property in the soil or bed of a navigable river or arm of the sea, and the right to use the waters for the purposes of navigation are entirely separate and distinct. The first of these rights is by the common law vested *prima facie* in the sovereign power; that is, in England, in the King; here in the people; but may be alienated by the King or people so as to become vested in an individual or corporation. The second is a right common to the whole people and it is vested in the public at large.”

See also, *Taylor v. Atlantic Mutual Insurance Company* (37 N. Y. 283), where it was said of the waters of the East River:

“These waters are part of the arm of the sea and are a public highway and navigable to all.”

No other use is shown of these waters, or of the land under them, than, that of simply using them to navigate

the defendants' vessels to and from the pier for the purpose of unloading them in their business. No evidence is given to show that the defendants' vessels have been accustomed to lie at anchor in those waters, or to do any other act that would indicate a use of the soil belonging to the plaintiff in such a manner as to entitle him to a claim of shipping or anchorage.

As we understand the provisions of the grant of the City of Dunham, it was the intention not only to reserve the fee of the street, but exclusively to reserve all the rights to the use of the pier which was contemplated to be constructed within the boundaries of Thirty-fourth Street. The deed speaks of the business done on the westerly end of the pier, evidently contemplating that the lands under water granted to the plaintiff on the southerly side of the street might also be docked out to the westerly side of Thirteenth Avenue in such manner as to require all business done at the pier or dock to be brought to the westerly end, and that so much as came to the westerly end of that part of the pier in the street was exclusively reserved to the City whoever might build the pier.

On a correct construction of the grant, the reservation or exception is necessarily, we think, of the whole of the pier built within the bounds of Thirty-fourth Street, and the right to use navigable waters on the south side of the present pier until the same are lawfully occupied by other piers or docks and that plaintiff cannot claim that he is injured by the fact that the City has constructed a pier in Thirty-fourth Street, which it might have required Dunham, its grantor, or his assignees, to have built.

There does not appear to us to be any ground upon which the plaintiff had the right to recover. His complaint was, therefore, rightly dismissed, and the judgment should be affirmed, with costs.

I concur.

CHAS. DANIELS.

I concur.

J. R. B.

(Reported in part in 19 Weekly Digest, 413; aff'd. 102 N. Y., 730 [Mem.]).

FILED  
SEP 29 1925

U. S. DEPARTMENT OF JUSTICE  
CLERK OF SUPREME COURT

# Supreme Court of the United States

OCTOBER TERM, 1925

No. 15

EDGAR S. APPLEBY and JOHN S. APPLEBY, INDIVIDUALLY AND  
EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES  
E. APPLEBY, DECEASED.

*Petitioners.*

*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL  
RAILROAD COMPANY OF NEW JERSEY, NEW YORK  
BUTCHERS' DRESSED MEAT COMPANY, NEW YORK  
HORSE MANURE TRANSPORTATION COMPANY, BURNS  
BROS., NEW YORK STOCK YARDS COMPANY, WEE-  
HAWKEN STOCK YARD COMPANY.

*Respondents.*

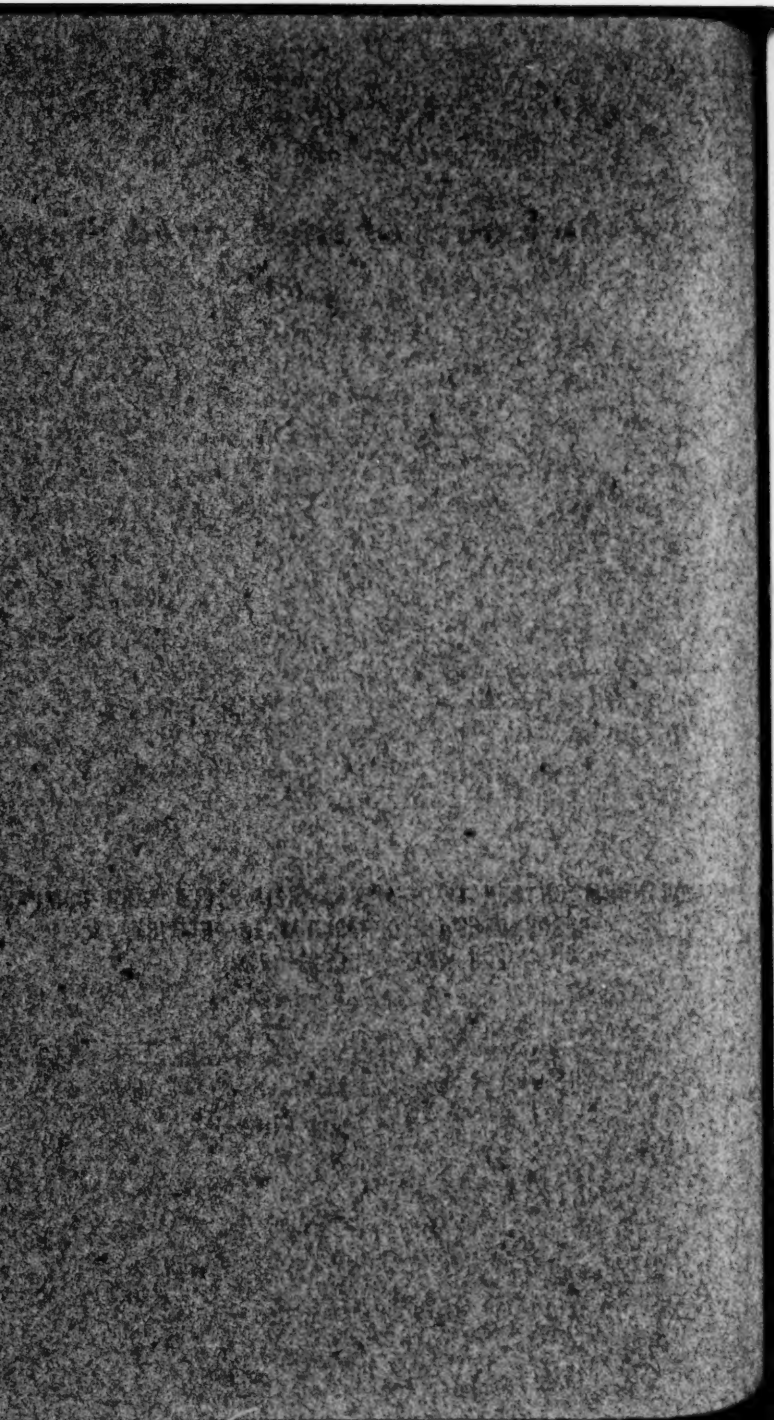
MEMORANDUM ON BEHALF OF WEEHAWKEN STOCK YARD COMPANY,  
RESPONDENT, IN OPPOSITION TO PETITION  
FOR WRIT OF HABEAS CORPUS.

STETSON, JENNINGS, RUSSELL & DAVIS,  
*Attorneys for Respondent, WEEHAWKEN*  
STOCK YARD COMPANY.

WILLIAM C. CANNON.

*Of Counsel.*





# Supreme Court of the United States,

OCTOBER TERM, 1923.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and Executors of the Last Will and Testament of Charles E. Appleby, deceased,  
Petitioners,

AGAINST

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,  
Respondents.

No.

## MEMORANDUM ON BEHALF OF WEEHAWKEN STOCK YARD COMPANY, RESPONDENT, IN OP- POSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondent, Weehawken Stock Yard Company, submits its case upon the brief of respondent, The City of New York.

STETSON, JENNINGS, RUSSELL & DAVIS,  
Attorneys for Respondent,  
Weehawken Stock Yard Company.

WILLIAM C. CANNON,  
of Counsel.

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Office Supreme Court, U. S.  
FILED

OCT 7 1925

WM. R. STANSBURY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1925.

No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and Executors of the Last Will and Testament of Charles E. Appleby, deceased,

*Plaintiffs-in-Error,*

*against*

THE CITY OF NEW YORK, EBEN E. OLCOTT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, NEW YORK BUTCHERS' DRESSED MEAT COMPANY, NEW YORK HORSE MANURE TRANSPORTATION COMPANY, BURNS BROS., NEW YORK STOCK YARDS COMPANY, WEEHAWKEN STOCK YARD COMPANY,

*Defendants-in-Error.*

## MEMORANDUM ON BEHALF OF WEEHAWKEN STOCK YARD COMPANY, DEFENDANT-IN-ERROR.

STETSON, JENNINGS, RUSSELL & DAVIS,  
Attorneys for Weehawken Stock Yard Company,  
New York City, N. Y.

WILLIAM C. CANNON,  
Of Counsel.



# Supreme Court of the United States

OCTOBER TERM, 1925.

EDGAR S. APPLEBY and JOHN S.  
APPLEBY, individually and Ex-  
ecutors of the Last Will and  
Testament of Charles E. Appleby,  
deceased,

Petitioners,  
Plaintiff-in-Error,

against

THE CITY OF NEW YORK, EBEN E.  
OLCOTT, CENTRAL RAILROAD COM-  
PANY OF NEW JERSEY, NEW YORK  
BUTCHERS' DRESSED MEAT COM-  
PANY, NEW YORK HORSE MANURE  
TRANSPORTATION COMPANY,  
BURNS BROS., NEW YORK STOCK  
YARDS COMPANY, WEEHAWKEN  
STOCK YARD COMPANY,

Respondents,  
Defendants-in-Error.

No. 15.

## MEMORANDUM ON BEHALF OF WEEHAWKEN STOCK YARD COMPANY, RESPONDENT, DEFENDANT-IN-ERROR.

The defendant-in-error, Weehawken Stock Yard Company, submits its case upon the brief of defendant-in-error, The City of New York.

STETSON, JENNINGS, RUSSELL & DAVIS,  
Attorneys for Defendant-in-Error,  
Weehawken Stock Yard Company.

WILLIAM C. CANNON,  
Of Counsel.

# SUPREME COURT OF THE UNITED STATES.

No. 15.—OCTOBER TERM, 1925.

Edgar S. Appleby and John S. Appleby, Individually and Executors of the last Will and Testament of Charles E. Appleby, Deceased, Plaintiffs in Error,

vs.

The City of New York, Eben E. Oleott, Central Railroad Company of New Jersey, New York Butchers Dressed Meat Company, New York Horse Manure Transportation Company, Burns Brothers, New York Stock Yards Company, Weehawken Stock Yard Company, Defendants in Error.

In Error to the Supreme Court of New York.

[June 1, 1926.]

This is a writ of error to review the judgment of the Supreme Court of New York as affirmed by the Court of Appeals. *Appleby v. City of New York*, 199 App. Div. 539; 235 N. Y. 351. The plaintiffs are executors of Charles E. Appleby, and hold deeds in fee simple from the City of New York, made in 1853 and 1852, one to their testator Appleby, and one to Latou, who later conveyed to Appleby. The land conveyed consists of two water lots in the City of New York on the east side of North River. This suit was brought in 1914 to restrain the defendant, the City of New York, and its co-defendants, lessees of the city's piers, from dredging the land under water conveyed by the deeds, and from using the water over the lots of the plaintiffs as slips and mooring places for vessels alongside those piers.

The Appellate Division and the Court of Appeals denied relief. This is a writ of error under section 237 of the Judicial Code, sued out on the ground that by its judgment, the Supreme Court of New York has upheld and enforced statutes of the State enacted in 1857 and 1871 in such a way as to impair the obligation of the

plaintiffs' deeds, in violation of section 10, Article I, of the Federal Constitution.

The City of New York was established before the Revolution by a charter of Governor Dongan in 1686, and by a subsequent charter of Governor Montgomery of 1730, under both of which it acquired title to the tideway, i. e., the strip between high and low water, surrounding the island of Manhattan. These grants were confirmed by the Constitution of 1777 of the State of New York. By the Act of 1807, Laws of 1807, p. 125, c. 115, the State granted to the city a strip of land under water along the westerly side of the Island, which extended from low water mark westerly into the Hudson River, a distance of 400 feet.

In 1837, the Legislature passed a law, Laws of 1837, c. 182, making 13th Avenue as laid out by the city surveyor the permanent exterior street along the easterly shore of the North or Hudson River in the district where these lots are. It extended the streets already laid out to 13th Avenue, and further provided that it should be construed to grant to the city forever the said lands under water easterly of 13th Avenue.

In pursuance of this law, ordinances were passed by the Sinking Fund Trustees of New York providing that the lands under water belonging to the city under its several charters might be sold and conveyed by such city to parties desiring to purchase the same, giving priority to the owners of the adjacent uplands. The ordinances were recognized and approved by the State Legislature in c. 225 of the Laws of 1845, and the city then made the deeds here to be considered.

The grant to Appleby was made on August 1, 1853, for the consideration of \$6,369.37, that to Latou on December 24, 1852, for \$4,937.50. The one covered land under water between 39th and 40th Streets and high water mark and 13th Avenue, the other land between 40th and 41st Streets and high water mark and 13th Avenue. The wording and covenants of the deeds were alike, *mutatis mutandis*. It will be enough to describe the Appleby deed. That granted

“All that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North river or harbor of New York, and bounded, described and containing as follows; that is to say;

“Beginning at a point of intersection of the line of original high water mark with the line of the centre of Thirty-ninth street and running thence westerly, along said centre line of 39th street, about one thousand and sixty-five feet to the westerly line or side of Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said City, as established by law, thence northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty eight feet, four and one-half inches, to a line running through the centre of Fortieth street; thence easterly along said centre line of Fortieth street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high water mark, and thence in a southerly direction along said centre line of original high water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed, dated New York, June, 1853, made by John J. Serrel, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture.

“The premises conveyed being colored pink on said map, be the same dimensions more or less.

“Saving and reserving from and out of the hereby granted premises, so much thereof, as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets for the uses and purposes of public streets.

“To have and to hold the said premises hereby granted to the said Charles E. Appleby, his heirs, and assigns to his own proper use, benefit and behoof forever.”

The pink map of lot referred to in the deed is on the following page.

Appleby in the deed covenanted with the city that within three months after the city required it, he would build four bulkheads and wharves, and fill in and pave such parts of 12th and 13th Avenues and 39th and 40th Streets as lay within the premises described, and keep them in repair, with the provision that in default the city might make them at the cost of Appleby, or sell and dispose of the premises or any part at public auction to supply the deficiency, and grant the land and the wharfage to other persons. Appleby further covenanted to pay all taxes on the lot and not to build the wharves, bulkheads, avenues or streets until permission was given by the city.

The city covenanted that Appleby and his heirs and assigns should receive “all manner of wharfage, eramage advantages or emoluments growing or accruing by or from that part of the



said exterior line of the said city, lying on the westerly side of the hereby granted premises fronting on the Hudson River, excepting therefrom wharfage from the westerly end of the bulkhead in front of the entire width of the northerly half part of 39th Street and the southerly half part of 40th Street, which were reserved to the City."

At the time of these deeds, there was no filling between the high water mark and 12th Avenue, but since that time and before 1871, the lots were filled by Appleby from high water mark to within 4 feet of the easterly side of 12th Avenue, a distance of approximately 500 feet.

In 1855, Laws of 1855, c. 121, for the avowed reason that grants had been made and piers built which obstructed the river navigation, provision was made for a harbor commission to prepare plans for harbor improvement and as a result chapter 763, Laws of 1857, was passed to establish for the harbor bulkhead and pier lines. In its second section it provided:

"It shall not be lawful to fill in with earth, stone, or other solid material in the waters of said port, beyond the bulkhead line or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of this act, and piers which shall not exceed seventy feet in width respectively, with intervening water spaces of at least one hundred feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond, or outside of the said sea wall."

In the same year, by virtue of the act the Harbor Commission established a bulkhead line beyond which there could be no solid filling at 100 feet west of 12th Avenue.

The necessary effect of this legislation and action if made effective was to abolish 13th Avenue as a *ripa* or exterior line on the river, and to prevent the filling of plaintiffs' lots outshore from the bulkhead line and the making of docks on the lots and the enjoyment of wharfage at the ends thereof within 100 feet of the city's piers.

By the Laws of 1871, c. 574, which amended section 99 of the Act of April 5, 1870, relating to the government of the City of New York, it was provided that the Department of Docks should be established, that it should determine upon such plans as they deemed

# NORTH OR HUDSONS RIVER

Exterior Line as Established by Law

Avenue

13<sup>th</sup>

39<sup>th</sup>

40<sup>th</sup>

12<sup>th</sup>

Avenue

Street

Street

New York June 1853

John J. Smith  
City Engineer

11<sup>th</sup>

Avenue



wise for the whole or any part of the water front, and submit them to the Commissioners of the Sinking Fund, who might adopt or reject any such plan. After the plan was adopted no wharf, pier, bulkhead, basin, dock, slip or any wharf, structure or superstructure should thereafter be laid out or constructed within the territory or district embraced in and specified upon such plan except in accordance with the plan. The Department was authorized in the Act of 1871 to acquire, in the name and for the benefit of the city any and all wharf property in the city to which the city had no right or title and any rights and easements and any rights, terms, easements and privileges pertaining to any wharf property in the city and not owned by the city, by purchase or by condemnation. By the Act of 1871, the bulkhead line for solid filling was fixed at 150 feet west of 12th Avenue, instead of 100 feet as previously fixed.

In 1890, the Secretary of War fixed the same bulkhead line as that fixed by Dock Commissioner under the Act of 1871. Thereupon, in 1894, a condemnation proceeding was begun by the city against Appleby to appropriate both lots. It was delayed for 20 years, presumably for a lack of funds. In 1914, it was discontinued by the city. This action was commenced shortly thereafter.

During the pendency of the condemnation proceeding, the city constructed concrete and steel piers against plaintiffs' objection within the lines of west 39th Street, of 40th Street and 41st Street, beginning at or near 12th Avenue and extending westerly to and beyond 13th Avenue. It placed thereon iron or steel sheds and leased these to tenants excluding the public from the piers. The piers have numerous doors and windows which open on to the water over the Appleby lots, so that boats are constantly moored and fastened alongside of the piers and in the adjoining slips upon plaintiffs' premises and discharge their cargoes and freight into the sheds. The city also constructed an overhanging dumping board or platform extending northerly from the 39th Street pier for the use of its tenants over the same water. The city has from time to time dredged plaintiffs' premises between its piers without their consent to a depth of about 20 feet, and threatens to continue to do so. West of the bulkhead line the depth of water varied from 4 feet in 1884 to 20 feet now. East of the line the bottom was an average depth of 3 feet and was dredged to 16 or 20 feet as far east as 50 feet from the west side of 12th Avenue, or 100 feet inside the bulk-

head line. The record contains reports in ten years, between 1895 and 1905, showing dredging of about 150,000 cubic yards in the two slips or basins. From its piers made more valuable by the use of these slips and mooring places, the city receives substantial rentals and income from its lessees and other occupants of the piers.

No request was ever made by the city that Appleby should fill the streets which he covenanted to fill on the city's call and not to fill until that. After the Act of 1871, the city built the piers, and the streets and avenues specified in the deeds, so far as they have been built. 13th Avenue being out shore from the bulkhead line fixed in 1857 and 1871 was never filled.

In January, 1917, the plaintiffs were required to pay as back taxes upon these lots the sum of \$74,426.01.

The prayer of the petition is that the city and its tenants and the other defendants be enjoined from using plaintiffs' lots as a slip or permanent mooring place and from dredging them.

The special term of the Supreme Court held that the deeds here in question conveyed a fee simple title to the plaintiffs, carrying both the *jus publicum* and the *jus privatum*, and that their rights could not be affected by the Act of 1857 and the Act of 1871, or the orders of the Dock Commissioners under that Act, but that the establishment of the bulkhead line by the Secretary of War in 1890 made the waters of the Hudson River westerly of that line open and in use for purposes of commerce and navigation, and that no action to restrain or prevent the use of that water for loading or unloading at the city piers would lie, but that the city was without right to dredge any soil or part of the granted premises east of the bulkhead line, and should be enjoined from doing so. The special term refused damages for the dredging which had been done for failure to adduce proper evidence as to what the damages were and allowed only a nominal recovery.

On appeal, the Appellate Division also held that the deeds carried to the plaintiffs the *jus publicum* and the *jus privatum* from the city and the State, and that the plaintiffs' rights under the deeds could not be affected by the Acts of 1857 and 1871, but closed its findings and conclusions as follows:

"The Federal statutes and the action of the Secretary of War in establishing a bulkhead line across the granted premises thereby constituted the waters beyond said bulkhead line navigable waters, and though the Federal Government established a pierhead line

further west in the river, as the Federal Government did not attempt to provide regulations as to the building of piers, wharves or docks within said space, the State Government had a right to regulate the construction of docks, piers, and wharves between said bulkhead line and pierhead lines, and having by Chapter 763 of the Laws of 1857 provided that no piers should be erected within 100 feet of another pier, and having by Chapter 574 of the Laws of 1871 as supplemented, and amended, authorized the City of New York through its officials, to adopt a plan for water front of the City of New York, including the erection of piers thereon and the City having pursuant to said resolution adopted a plan requiring piers to be erected in 39th, 40th and 41st Streets, and said piers having been erected, thereby prevented the plaintiffs from erecting any pier, wharf or other structure whatsoever upon their premises under water between the said bulkhead line established by the Secretary of War and 13th avenue.

"Section 33. The plaintiffs are not entitled to an injunction restraining the City of New York from using or authorizing the use by others of the plaintiffs' premises either within or without the Federal bulkhead line, for the purpose of mooring, docking and floating boats."

The Court of Appeals in its opinion, affirming the decree of the Appellate Division, after referring to the laws of 1857 and 1871 as the basis of the contention of the city that the plaintiffs were not entitled to relief, said:

"When the Secretary of War established the bulkhead line, the title of the State, the city and its grantees beyond such line was subordinated to such use of the submerged lands as should be required for the public right of navigation. No private property right requiring compensation was taken or destroyed by the establishment of such line. The owner's title was subject to the use which the United States might make of it. Plaintiffs have no authority to fill in any portion of their lands west of the bulkhead line. The city of New York in the execution of its plans for the improvement of the water front westerly of such line for the purpose of navigation invaded no right of plaintiffs."

The Court said further that if the plaintiffs' lots easterly of the bulkhead line had been actually filled in, they would no longer be lands under water and would be completely subject to the plaintiffs' control, but that so long as they remained unfilled and under water, they were subject to the sovereign power of the State and city to regulate the use of the water over them for purposes of navigation, and accordingly held that in respect to them

the city had invaded no right of the plaintiffs. The opinion of the Court of Appeals indicates that previous decisions of the court contain dicta in respect to the *jus publicum* and *jus privatum* that can not be sustained.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has interpreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.

The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of that court. Of course we should give all proper weight to its judgment, but we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration. It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment. In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the State, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry.

Ordinarily this Court must receive from the court of last resort of a State its statement of state law as final and conclusive, but the rule is different in a case like this. *Jefferson Bank v. Skelly*, 1 Black. 436, 443; *University v. People*, 99 U. S. 309, 321; *New*

*Orleans Water Company v. Louisiana Sugar Company*, 125 U. S. 18, 38; *Huntington v. Attwill*, 146 U. S. 657, 684; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486; *Louisiana Railway & Navigation Company v. New Orleans*, 235 U. S. 164, 170, 171; *Long Sault Co. v. Call*, 242 U. S. 272, 277; *Columbia Railway v. South Carolina*, 261 U. S. 236, 245.

We must also consider here what effect the action of the United States in its dominant control over tidal waters for the preservation and promotion of navigation has had in affecting or destroying the rights of the plaintiffs claimed to have been impaired by the Acts of 1857 and 1871, and to consider whether such action has rendered the state legislative impairment innocuous and deprived plaintiffs of the right to complain of it.

Upon the American Revolution, all the proprietary rights of the Crown and Parliament in and all their dominion over lands under tidewater vested in the several States, subject to the powers surrendered to the National Government by the Constitution of the United States. *Shively v. Bowlby*, 152 U. S. 1. The rights of the plaintiffs in error under the two deeds here in question with their covenants are to be determined then by the law of New York as it was at the time of their execution and delivery. They were not deeds of gift—they were deeds for valuable consideration paid in money at the time, and a large amount of taxes on the lots have been collected from the plaintiffs by reason of their ownership. The principle applicable in the construction of grants of lands under navigable waters in the State of New York was announced by the Supreme Court of Errors in 1829 in *Lansing v. Smith*, 4 Wend. 1. In that case, which has always been regarded as a leading one, the commissioners of the Land Office in New York granted without valuable consideration to an upland owner land under water on which he erected a wharf after filling in the same. Thereafter the legislature authorized the erection of a mole or pier in the river for the purpose of constructing a basin for the safety and protection of canal boats, and this mole or pier entirely encompassed the wharf on the side of the water so as to leave no communication between it and the river except through a sloop lock at one extremity of the basin. It was held that the loss sustained by the owner was *damnum absque injuria*, that the grant only conveyed the land described in it by metes and



bounds, and being in derogation of the rights of the public, nothing would be implied.

Chancellor Walworth, speaking for the Court of Errors of the State, said:

"By the common law, the king as *parens patriae* owned the soil under all the waters of all navigable rivers or arms of the sea where the tide regularly ebbs and flows, including the shore or bank to high water mark. He held these rights, not for his own benefit, but for the benefit of his subjects at large; who were entitled to the free use of the sea, and all tide waters, for the purposes of navigation, fishing, etc., subject to such regulations and restrictions as the crown or the parliament might prescribe. By *magna charta*, and many subsequent statutes, the powers of the king are limited, and he can not now deprive his subjects of these rights by granting the public navigable waters to individuals. But there can be no doubt of the right of parliament in England, or the legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual. Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals."

In the case of *New York v. New York & Staten Island Ferry Company*, 68 N. Y. 71, the Court of Appeals, speaking of the common law, said at p. 77:

"But while the sovereign can make no grant in derogation of the common right of passage over navigable waters, parliament may do so. . . . But a person claiming a special right in a navigable river or arm of the sea under a grant by parliament, as for example, a right to obstruct it, or to interfere in any way with the public easement, must show a clear title. It will not be presumed that the legislature intended to destroy or abridge the public right for private benefit, and words of doubtful or equivocal import will not work this consequence. . . . (at p. 78.) The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tidewaters, or authorize a use inconsistent with the public right, subject to the paramount control of congress, through laws passed, in pursuance of the power to regulate commerce, given by the Federal Constitution."

In that case the question involved the effect of a legislative grant of lands under water so far as appears without valuable consideration by the land commission of the State in 1918 to one John Gore on the eastern shore of Staten Island, including the premises thereafter acquired by the New York & Staten Island Ferry Company. The grant extended from low water mark into the Bay a distance of 500 feet, to have and to hold to Gore, his heirs and assigns, as a good and indefeasible estate of inheritance forever, under a statute authorizing the grant of such lands as the Commissioners should "deem necessary to promote the commerce of the state." It was held that as there was nothing to show that it was intended to restrict the State in the preservation of the navigation of the river in that 500 feet, the grant to Gore might be and was restricted by the subsequent statute of 1857 of the State of New York, providing that it should not be lawful to fill in the land granted with earth or other solid material beyond the bulkhead line established under that law, or by piers that should exceed 70 feet in width, with intervening water spaces of at least 100 feet between them. It was therefore decided that the erection of a clubhouse on the land granted was a purpresture.

It is apparent from these decisions that under the law of New York when these cases were decided, whenever the legislature deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself from its exercise as sovereign of the *jus publicum*, that is the power to preserve and regulate navigation, it might do so; but that the conclusion that it had thus excluded the *jus publicum* could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted.

What is thus declared as the law of New York in these two cases, where it was found that the *jus publicum* had not been conveyed, is shown in a number of cases in the Court of Appeals in which the State and its agency, the city, did part with the *jus publicum* to private owners of land under tidal water and of wharfage rights thereon upon adequate compensation and in pursuance of a plan of harbor improvement for the public interest.

In the case of *Duryea v. The Mayor*, 62 N. Y. 592, and 96 N. Y. 477, a deed of land under tidal water by the City of New York, with the authority of the State, conferred upon the grantees a fee

simple title with all the privileges of an absolute owner, except as restricted by the covenants and reservations contained in it. The covenants related to the filling of the streets running through the lots which were excepted from the grant. The grantees had partially filled the water lots and while this was being done the city with a sewer had flowed the land with the contents of the sewer. The sewer had been placed under a revocable license of the owner, but when the license was withdrawn the city insisted on continuing to use the lots for sewer discharge and this it was held the city could not do.

In the later case, in 1884, the Court of Appeals, speaking of the deed, said at p. 477:

"As we have before seen the deed conferred upon the grantees therein the title and absolute ownership of the property conveyed, subject only to be defeated at the option of the grantor for a breach of the condition subsequent. The claim now made, that there was some right or interest in the property which still remained in the city notwithstanding its deed, is opposed to the principles declared in our former decision, and the express language of the conveyance."

In *Towle v. Remsen*, 70 N. Y. 303, 308, the Court of Appeals, in dealing with the effect of a deed of New York City of land under tidal waters, said:

"The land under water originally belonged to the Crown of Great Britain, and passed by the Revolution to the State of New York. The portion between high and low water mark, known as the tide-way, was granted to the city by the early charters (Dongan charter, Secs. 3 and 14; Montgomerie charter, Sec. 37), and the corporation have an absolute fee in the same (*Nott v. Thayer*, 2 Bosw. 61). It necessarily follows that the city had a perfect right, when it granted to the devisees of Clarke, to make the grant of their portion of the land in fee simple absolute. As to the land outside of the tide-way, the city took title under chapter 115 of the laws of 1807, with a proviso giving the pre-emptive right to the owners of the adjacent land in all grants made by the corporation of lands under water granted by said act. . . . The Legislature left it to the city to dispose of the interests mentioned upon the proviso referred to; but it enacted no condition that it should not dispose of that which it owned in fee simple upon such terms as it deemed proper, and in the absence of any such enactment, such a condition can not be implied."

A deed of this class came before the Court of Appeals in *Langdon v. The Mayor*, 93 N. Y. 129. The State Commissioners of the Land

Office, under a law of 1807, granted to the city a strip of land under water in the North River, the westerly line of which was in the river 400 feet west of the low water mark. The city laid out an extension of **West Street** along this strip, parallel with the river, the westerly line of the street being about 200 feet out in the river west of low water mark. In 1810 the city granted to Astor, the owner of the adjoining uplands, certain lands under water, including a portion of the strip, the westerly bounds of the grant being "the permanent line of West street, saving and reserving so much of the same as will be necessary to make West street in accordance with the map or plan." In consideration of the grant the grantee covenanted to pay certain perpetual rents, to make such wharves as should be necessary to make the portion of West Street, within the bounds of the grant, of the width specified, and forever thereafter to maintain and keep them in repair. The city covenanted that the grantee should at all times thereafter have the wharfage, from the wharf or wharves to be erected on the west end of the premises granted. Astor constructed West Street across the land granted, in accordance with his covenant, and maintained the wharf on the westerly line of said street. Without making compensation to the plaintiff who succeeded to his title, the city erected a bulkhead out shore from such westerly line and filled up the space between it and the old bulkhead, and destroyed the use of the wharf. It was contended that the city and State could not part with the power to preserve and regulate navigation in the water between the wharf and the 200 feet beyond owned by the city. The Court of Appeals held that the covenant as to the wharf which the city made to Astor in the deed was a grant of an incorporeal hereditament of wharfage which the city or State could not impair, that the city acquired by its grant from the State the right to fill up the land granted, to build wharves thereon and to receive wharfage; that whatever property rights it thus acquired it could convey to individuals; that by its grant to Astor, the city conveyed not only the land, excepting the part covered by West Street, but also the right of wharfage; that an easement, i. e., a perpetual right of free access to the wharf across West Street over the land of the city therein passed by necessary implication; that the city had the right to grant such easement; that the legislature could not by the act in question authorize a

destruction or impairment of this easement without compensation to the owner, and that, therefore, the action for damages was maintainable.

In the course of his opinion for the court, Judge Earl, speaking of the power of the city conferred upon it by the State, said (at page 144):

"Here, taking the language of the charters and grants, the course of legislation, and all the statutes in *pari materia*, the situation of the lands granted and the use to which many portions of them had, with the knowledge and consent of the legislature, been from time to time devoted, it is very clear that the lands under water around the city were conveyed to it in fee, to enable it to fill them up as the interest of the city might require, and to regulate and control the wharves and wharfage. . . . We think it equally clear that whatever title and property rights the city thus obtained, it could transfer and convey to individuals. Having the power to extend the ripa around the city, and thus make dry land, it could authorize any individual to do it. Whatever wharves and docks it could build, it could authorize the individuals to build, and whatever wharfage it could take, it could authorize individuals to take. Its dominion over the lands under water, certainly for the purposes indicated in the preamble contained in section 15 above cited, was complete."

Speaking of the wharfage granted, the judge said (at page 152):

"An easement for access to the wharf over the adjacent land of the city under water passed by necessary implication. Without the easement the wharf would be of no use, there could be no wharfage, and the grant as to the wharf and wharfage would be futile. The grant was made for an adequate valuable consideration. It was not made solely or primarily for the benefit of the grantee, but primarily for the benefit of the city in pursuance of a policy for improving its harbor and furnishing its treasury. Under such circumstances there is no rule of construction which can confine the grant to the metes and bounds mentioned in the deed. If the city had owned the wharf and granted it, the right to wharfage and an easement for access to the wharf over the adjacent land of the city under water would have passed by necessary implication as incidents and appurtenances of the thing granted. So it would seem that a grant of the right to build and forever maintain a wharf upon the land of the city, would upon the same principle carry with it the right to take the wharfage and have access to the wharf. In addition to the right to build and maintain the wharf, however, here there was on the part of the city an express grant of the wharfage, and it must have been the intention of the parties

that the grantee should have open water in front of his wharf for the accommodation of vessels that the wharfage which was granted to him might be earned."

The necessary effect of the *Langdon* case, which has always been a leading authority in the State of New York, is that a grant upon a valuable consideration of the easement of wharfage related to land under water conveyed by the city by authority of the State, for the purpose of promoting commerce and the harbor of the city, takes away from the city and State the power to regulate navigation in any way which would interfere with or obstruct the grant, and that if the city desired in the interest of navigation to obstruct such easement, it must acquire it by condemnation. If it may do this, it follows necessarily that it may by an absolute deed of land under water, with the right of the grantee to fill it, part with its own power to regulate the navigation of water over this land which would interfere with its ownership and enjoyment by the grantee.

The *Langdon* case was approved and followed in the case of *Williams v. City of New York*, 105 N. Y. 419. In that case, the city under New York laws of 1813 and 1857 was held to have received authority from the State to fill in the east side of the East River from an existing bulkhead to 13th Avenue with a new bulkhead there. The city made a grant to a private person of the land under water some eighty feet, with a requirement that he fill it in and build the new bulkhead with wharfage on the outer bulkhead. It was held that he took a fee, that he had an easement for the approach of vessels in its front and that the property thus granted him could not be taken by the city for the public use without compensation. The court said in that case:

"The authority thus given being commensurate with the municipal limits, involved a grant of so much of the land of the State under water as those wharves would occupy if the city's choice of location required such appropriation. This right was tantamount to an ownership. It embraced the entire beneficial interest, and was inconsistent with any title remaining in the State. The wharf when built completely occupied the land under water, and might be built, if need be, of stone and earth. All use for the floating of vessels disappeared, so far as it occupied the water. The new and substituted use created by the city or its grantees belonged wholly to them, for the entire benefit in the form of shippage, wharfage and crantage, was given to them. There was never any restraint

put upon this general grant, and the ownership involved where the plans carried the wharves on to the State's land in the stream, except the limitation of exterior lines beyond which the authority should not go, or that imposed by general plans agreed upon by both parties. . . .

" . . . So that when the State granted to the city wharf rights which might extend into the deep water covering its own land it granted two things: property in the land covered by the wharf and occupied by it and an easement for approach of vessels in its front. That easement the State by its own sole action could not take away or destroy without awarding adequate compensation."

The same principle was announced in *Mayor v. Law*, 125 N. Y. 380.

In *People v. Steeplechase Park Company*, 218 N. Y. 459, it was held that where the State, through its land commissioners, unqualifiedly granted to defendants lands in navigable waters between high and low water marks, the exclusive use and right of possession vested in the grantee. Hogan, Cardozo and Seabury, Judges, dissented. The ruling went to the extent of deciding that fences, barriers, platforms, pavilions and other structures of a private amusement park constructed by the grantee on lands under navigable water between high and low water mark, although an interference with the public use of and access to such lands, could not be enjoined where the grant of such lands was unqualified.

In that case at pp. 479, 480, the court said:

"During all our history that legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters. The public interest may require the building of docks and piers to facilitate approach to the channel of such navigable waters. The beneficial enjoyment of land adjoining the channel of public waters may require or at least justify the conveyance of lands below high water on which to erect buildings. As in England the crown and Parliament can without limitation convey land under public waters, so in this state land under water below high-water mark can be conveyed by the legislature, or in accordance with constitutional and legislative direction. Where the state has conveyed lands without restriction intending to grant a fee therein for beneficial enjoyment, the title of the grantee except as against the rights of riparian or littoral owners, is absolute, and unless the grant is attacked for some reason recognized as a ground for attack by the courts or the use thereof is prevented by the Federal government, there is no authority for an injunction against its legitimate use."

The *Duryea* and the *Langdon* cases rest on the delegation by the State to the city of the State's sovereign right to control navigation or the *jus publicum* in the land to be disposed of by the city to private owners in pursuit of the promotion of filling land under water to a ripa or exterior line, and of the construction of docks to make a harbor. The rights of such private owners come not from riparian rights, or gratuitous statutory grants. They come from a deed absolute of the lots conveyed for a money consideration. The *Steeplechase Park* case was a close case as shown by the dissents and was not nearly so strong a one for the application of the principle above stated as the case at bar, or the *Duryea* and *Langdon* cases.

If we are right in our conclusion as to the effect of these deeds under the law of New York at the time of their execution, then there can be no doubt that the laws of 1857 and 1871 as enforced in this case impair the contract made by the city with the grantees of these deeds.

Cases cited as contrary to the New York City water lot decisions just considered must be examined to see whether they involve grants of lots under tidewater by deed absolute in fee simple from the city or State in consideration of money paid and in promotion of harbor plans or other public purposes.

*The Knickerbocker Ice Co. v. 42nd R. Co.*, 176 N. Y. 408, is relied on to show a conclusion adverse to the inferences we have drawn as to the New York law. There the Court of Appeals sustained an order denying an injunction to restrain the city from effecting an extension of 43d Street into the Hudson River sought by one who by deed of the city was given the right to wharfage at the end of 43d Street. In the same deed land under water on each side of the street was conveyed to the grantee in fee simple. The Court held that the street was held in trust by the city for the public use and that the grant of wharfage at the end of the street did not carry the fee in the street but only an easement of wharfage at the end of the street as the city might extend it into the river, and that by virtue of covenant in the deed, the grantee if he would enjoy the wharfage must erect a new wharf or pier at the new end of the extended street. The grant was not of the fee but only of an ambulatory easement of wharfage on any extension of the street. But the city was nevertheless thereafter re-



quired to condemn this grant of the easement. *American Ice Company v. City of New York*, 193 N. Y. 673, and 217 N. Y. 402.

The case of *Sage v. Mayor*, 154 N. Y. 61, 79, does not conflict in any way with the *Langdon* and other cases. That only concerned the right of a riparian owner in the tideway which the city owned and deeded to another. It was held that the riparian owner had no more right to complain of the city's disposition of the tideway for the public interest by deed than had the owner of a United States Patent reaching to high water mark to complain of the State's disposition of the tideway in Oregon in *Shively v. Bowlby*, *supra*.

The cases of *Brookhaven v. Smith*, 188 N. Y. 74, and *Barnes v. Midland R. R. Terminal Company*, 193 N. Y. 378, concern conflicting rights of riparian owners and of persons with limited grants to put out a wharf without any fee simple title and seem to us to have no bearing upon the question here.

In *Lewis Blue Point Co. v. Briggs*, 198 N. Y. 287, grantees under deeds made before 1700 conveying the exclusive right of fishing leased for ten years the right to plant and cultivate oysters in the navigable waters of the Great South Bay, Long Island, were held subject to an Act of Congress authorizing and directing the dredging of a channel 2,000 feet long and 200 feet wide through their oyster beds without claim for compensation. It was held that they had derived no more right in the fishery than the King had in his private ownership and he could not convey the right to restrict navigation which he held in trust for the public. The colonial grant, therefore, which was not like a grant from the State, did not exclude the sovereign right to provide for navigation. Moreover, it was a federal right which the owners were opposing and of course they had to yield. *Tempel v. United States*, 248 U. S. 121; *Lewis Blue Point Oyster Company v. Briggs*, 229 U. S. 82.

It is urged against our view of what these deeds conveyed of the sovereign power of the State and the ownership of the city at the time of their execution, that it is opposed to the judgment of this Court in *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, in which the validity of grant by the Illinois Legislature to the Illinois Central Railroad Company of more than 1,000 acres in the harbor of Chicago in Lake Michigan, was

under consideration. It was more than three times the area of the outer harbor, and not only included all that harbor, but embraced the adjoining submerged lands which would in all probability be thereafter included in the harbor. It was held that it was not conceivable that a legislature could divest the State of this absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power, and that a grant of such right was invalid. The limitations on the doctrine were stated by Mr. Justice Field, who delivered the opinion, as follows, at page 452:

"The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjusted cases can be reconciled."

That case arose in the Circuit Court of the United States, and the conclusion reached was necessarily a statement of Illinois law, but the general principle and the exception have been recognized the country over and have been approved in several cases in the State of New York.

In *Coxe v. State*, 144 N. Y. 396, a company was created to re-claim and drain all or any portion of the wet or overflowed lands and tidewater marshes on or adjacent to Staten Island and Long Island, except such portions of the same as were included within the corporate limits of any city, upon the deposit of \$25,000 and the payment to the State of a sum to be fixed by a commission after doing the work. This was a suit to recover a \$25,000 deposit, because the Attorney General had decided the law to be unconstitutional. The Court followed the *Illinois Central Railroad* case, and held the law invalid, but said:

"For every purpose which may be useful, convenient or necessary to the public, the State has the unquestionable right to make grants in fee or conditionally, for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the city of New York of the lands around Manhattan Island clearly comes within this principle, since it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city and consequently of the people of the state." Citing *Langdon v. Mayor*, 93 N. Y. 129.

The opinion says:

"The title which the state holds and the power of disposition is an incident and part of its sovereignty that can not be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit."

The same rule and exception are laid down in *Long Sault Development Company v. Kennedy*, 212 N. Y. 1, where the Legislature of New York attempted to give complete control of the navigation of the St. Lawrence River in the region of Long Sault Rapids, to a private corporation and abdicate its sovereign function. The Court held the grant invalid, but said in stating the exception:

"The power of the Legislature to grant under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this Court too often

to be open to serious question at this late day". Citing *Lansing v. Smith, supra*; *New York v. New York & Staten Island Ferry Company, supra*; and *Langdon v. The Mayor, supra*; and added,

"The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the Public."

There is an interesting discussion of the same exception by Chief Justice Bartlett in *People v. Steeplechase Park, supra*, at p. 482, in which he cites *United States v. Mission Rock Company*, 189 U. S. 391, 406, and emphasizes the distinction between the *Illinois Central*, the *Coxe*, and *Long Sault* cases and grants like those we are considering. It is clear that the ruling in those cases has no application here.

But it is said, and the court below held, that the fee simple granted by the deeds in this case did not exclude the right of the city to regulate and preserve navigation over the waters covering the land conveyed until they were filled, and that this distinguishes the *Duryea*, *Langdon*, and other cases, in which the filling had taken place, from the present one.

The suggestion that rights of ownership in lands under water conveyed by the city, by such a deed in fee simple, are restricted, and the city's control of navigation of the water over them remains complete until they are filled can not be accepted without qualification in respect to grants which are intended to part both with the *jus publicum* and *jus privatum* as we have found these deeds to do. The suggestion does not find support in the case of *First Construction Company of Brooklyn v. State*, 221 N. Y. 295, cited to sustain it. In that case, Beard was an upland owner whose land bordered on Gowanus Bay. The legislature in three acts granted to a private person the right to build wharves and fill in lands in a salt meadow marsh and mud flats partially submerged at high tides. The Court, Hiscock, C. J., in stating the case, said:

"It may be stated generally that none of them (the legislative acts) did more than grant to Beard and others the privilege to build wharves etc. and fill in lands; none of them purported in terms to grant and convey the title to lands under water included within the area now appropriated, and none of them was passed by a two thirds vote."

It was held that no title could pass, because it was a gratuity, and no grant could be made under the Constitution without a two-

thirds vote of the legislature which was not here, and that it was only a privilege or franchise which could not ripen into a title until the land was filled. It does not bear on the case here except in the necessary inference from the treatment of the matter in the opinion that if title had passed, filling was not necessary to vest full fee simple in the grantee.

Of course we do not intend to say that under such deeds as these as long as water connected with the river remains over the land conveyed and to be filled, navigation may not go on and boats may not ply over it and that incident to such use occasional mooring may not take place. But it is a very different thing to say that the city which has parted with the *jus publicum* and *jus privatum* over such water lots remains in unrestricted control of navigation to dredge them or appropriate the water over them as a slip or regular mooring place for its adjoining piers in the doing of a great business largely excluding plaintiffs and all others from use of the water over those lots for the constant private use of the city's tenants for its profit. This distinction and conclusion is borne out by the decision of the Court of Appeals in *In re Mayor of The City*, 193 N. Y. 503, where the court was dealing with the question of the elements of value of a pier right in the Hudson River, granted by the city to an individual in a deed with covenants quite like those in this case when the pier adjoined an unfilled water lot of the city. The court said:

"The deed of the pierhead can not be construed as conferring any right of access from or over the lands which the city might at its pleasure cause to be filled in. It is obvious of course that so long as this territory was not filled in, it served the purpose of access to the pier, but that was merely a privilege of sufferance and not a legal right."

The evidence shows that two slips between the city piers at 39th Street and 40th Street, and those between 40th Street and 41st Street are usually blocked with coal barges, with railroad floats carrying box cars on them, with cattle boats using a runway for cattle at the side of the piers, and all are being moored in the slips for the use and benefit of the lessees and other tenants of the city for the pecuniary profit of the city. This and the dredging of the soil of the plaintiffs certainly are more than a privilege of sufferance. *Whitaker v. Burhans*, 62 Barb. 237; *Wall v. Pittsburg Harbor Co.*, 152 Pa. 427.

The wharfage rights of the city at the piers in 39th, 40th and 41st Streets as far as 13th Avenue under the deeds before us cover only the ends of those piers and not their sides. This is clear, because the grantees of the deeds were vested with the wharfage on 13th Avenue along the river extending from 39th Street to 41st Street, except that at the ends of the cross streets. In this state of the case, the rights of the city having parted with the sovereign regulation of navigation in the water over these lots are not different from those of the owner of the upland who builds out his pier to deep water. His right is limited to the front or end of the pier for his private use.

Judge Cullen, in *Jenks v. Miller*, 14 App. Div. 480, points out that "though the owner of an adjacent upland has the right of access to the river, and also the right to construct a proper pier thereon, he has no easement or interest in the lands under water in front of the adjacent proprietors, and that the riparian right of access, so far as it is a proper right incident to the ownership of the upland, is strictly a right of access by the front."

The same principle is approved in *Consumers Coal & Ice Company v. City of New York*, 181 App. Div. 388, 394, where it said that privately owned land under public waters is subject to the navigation of vessels over it, but can not be appropriated by others to enlarge the berths at private piers. Compare *Keyport Steamboat Company v. Transportation Co.*, 18 N. J. Eq. 511, 515; *United States v. Bain*, 24 Fed. Cases 940, No. 14496.

Our conclusions are that Appleby and Latou were vested with the fee simple title in the lots conveyed, and with a grant of the wharfage at the ends of the lots on the river, that with respect to the water over those lots and the wharfage, the State and the city had parted with the *jus publicum* and the *jus privatum*, and that the city can only be revested with that by a condemnation of the rights granted.

When, then, is the effect upon the rights of the parties of the fact that the grantees only filled the part of lots conveyed east of 12th Avenue? The plaintiffs are not in default in this, because there was no covenant on their part to fill. *Duryea v. Mayor*, *supra*, at p. 596; 96 N. Y. 477, 496; *Mayor v. Lane*, *supra*, at p. 391. The filling was left to their convenience. They were not in default with reference to filling in the streets and avenues, because their cove-

nant to do so was only on condition that the city should require it, and only when it did so. The reason for their delay in filling the remainder of the lot beyond 12th Avenue was doubtless due to the passage of the Act of 1857 and of the Act of 1871, and their reasonable expectation that the city would condemn their rights, an expectation that was confirmed by the condemnation proceeding which was directed to be begun in 1890 by the Dock Commission, and was begun in 1894, and remained without prosecution, and operated as a dead hand upon this property for twenty years until 1914, when the city discontinued it. Thereupon this suit was promptly brought.

The rights of the plaintiff with reference to the use of the water over their lots lying between the bulkhead line and 12th Avenue are not affected by the order of the Secretary of War. The evidence shows that for 100 feet or more inside the line the water over these lots is made part of the slip and city mooring place for the city's pier, that in order to adapt it to such a purpose the soil in the lots is being constantly dredged, the dredging having increased the depth of the water from three feet to sixteen and twenty feet. This has been done by the city on the assumption that because it is water connected with the river, the city may improve its navigation. As the city has parted with the *jus publicum* in respect to these lots, it may not exercise this power and must be content with sailing over it with boats as it finds it. The dredging of the mud in those lots to a depth of fifteen feet in their lots is a trespass upon the plaintiffs' rights. They have a right at their convenience to fill both lots from the bulkhead line easterly to 12th Avenue and beyond. And we know from a record in a related case argued with this and to be decided this day, that they have applied for permission to fill the lots and are pressing their right to do so. So, too, the use of the water over these lots inside the bulkhead line for mooring places, berths or slips by the city and its tenants, as we have shown, violates the rights of the plaintiffs. They are entitled to an injunction against both.

The order of the Secretary of War of 1890 fixing the bulkhead line 150 feet west of 12th Avenue, and allowing pier extensions far beyond 13th Avenue, to 700 feet from the bulkhead line, does not take away the right of the plaintiffs to object to the city's dredging their lots or to its using the water over their lots for what is

in effect an exclusive slip and mooring place. The order did not restore to the city the power as against these plaintiffs to regulate navigation over their lots, and so did not make the Act of 1857 and the Act of 1871 with respect to the spacing of 100 feet between piers and for mooring places adjoining the piers effective to defeat those deeds. The action of the city in making these deeds and covenants was of course subject to the dominant right of the Government of the United States to control navigation, but the exercise of that dominant right did not revert in the city a control and proprietary right which it had parted with by solemn deed and covenant to these plaintiffs.

The only just and possible result of the Secretary of War's order is that the enjoyment by the plaintiffs of their rights under the deeds is qualified to the extent of a compliance with it without conferring any affirmative power upon the city to detract from the rights which it had granted. The plaintiffs are prevented from solidly filling between the bulkhead line and 13th Avenue, but the order expressly authorizes the substitution for such filling of the construction of piers on piling driven into the lots of the plaintiffs. To whom is given the right to build piers over these lots? The Government does not attempt to take it away from the owners of the lots. It does not attempt to vest it in the city. It could not do so if it would. The right must reside in those who have the ownership of the land under the water and who until the Secretary had made his order were entitled by their grants to use the solid filling up to the line of 13th Avenue, without reference to the bulkhead lines or to the 100 feet spacing between the piers under the Acts of 1857 or 1871.

The lots have been bought and paid for subject only to control by the General Government in the interest of navigation. The General Government through its agent says it does not require open water for navigation but is sufficiently satisfied by piers on piles extending over the water. The city has by deed granted to the Applebys the wharfage and cramage rights upon these lots. What is there to prevent the Applebys by the construction of piers on piles over their lots, in conformity to the Secretary of War's order, from enjoying the profit from that wharfage?

It thus is seen that the limitations on the right of the city to use the water over the lots outshore from the bulkhead line are



no different from what they are inshore of the bulkhead line. The right of the city in respect to the use of the water over the lots beyond the bulkhead line is as is said in *In re Mayor of the City, supra*, already quoted, merely a privilege by sufferance and not a legal right, and lasts only until these lots may be covered by piers on piles as allowed by the Secretary of War.

The plaintiffs are therefore entitled also to an injunction to prevent the dredging of their lots by the city from the bulkhead line to 13th Avenue, and also to prevent the continued use of the water over their lots in that same extent as a slip or permanent mooring place for the adjoining piers of the city. They are also entitled to a specific injunction against the overhanging platform which was put out by the city for its tenants on the north side of the 39th Street pier.

The application of the Acts of 1857 and 1871 by the courts of New York would reduce the rights which were intended to be conveyed in these deeds to practically nothing, and would leave the grantees only the privilege of paying taxes for something quite unsubstantial. The qualification of those rights by the order of the Secretary of War still leaves value in the deeds, if the Acts of 1857 and 1871 are invalid, as we hold them to be when applied as they have been in this case.

The judgment of the Supreme Court of New York is reversed for further proceedings not inconsistent with this opinion.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*